A TREATISE

ON THE

Law and Practice

RELATING TO

VENDORS AND PURCHASERS

OF

REAL ESTATE.

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CHAPTER XIII.

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AS TO MATTERS RELATING TO THE COMPLETION OF THE PURCHASE.

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Section 1.

The execution of the conveyance, &c.

Vendor must convey in person.

(1.) THE vendor must, if practicable, in person convey (*a*), or, as respects copyholds, surrender (*b*) the property: the purchaser need not unnecessarily rely upon a power of attorney, which, although irrevocable if given for valuable consideration (*c*), may have determined by the death of the principal (*d*); or may have been suspended by his mental

(*a*) 2 Ves. 681.

(*b*) *Mitchel* v. *Neale*, 2 Ves. 679; *Noel* v. *Weston*, 6 Madd. 50; see *Anon.*, cited 1 Esp. 116; *Richards* v. *Barton*, *ibid* 269.

(*c*) *Suprà*, p. 311.

(*d*) *Wallace* v. *Cook*, 5 Esp. 117; see *Bailey* v. *Collet*, 18 Beav. 179; and *Webb* v. *Kirby*, 3 Jur. N. S. 73; 3 Sma. & G. 333; 7 De G. M. & G. 376.

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incapacity (e). Any assurance of a married woman's interest in real estate, executed under a power of attorney, seems to be inoperative (f). Where a deed is executed by attorney, the attorney executes in the name of his principal: the fact being noticed in the attestation. So, also, apparently, in the case of the execution of a deed by the committee of a lunatic, on his behalf (g).

Conveyance of freeholds by married woman must be acknowledged under 3 & 4 Will. IV. c. 74.

Where, on the sale of freeholds, a married woman joins in respect of her estate or interest not settled to her separate appointment or use, her acknowledgment of the deed under the 3 & 4 Will. IV. c. 74, is an essential part of the conveyance (h): so, where, being entitled to the proceeds of real estate devised in trust for sale, she joins in conveying this estate to the trustee (i); such concurrence being for the purpose of obviating some possible objection to the validity of the sale itself; and not merely to supply the want of a power in the trustee to give a sufficient discharge for the purchase-money: and the purchase-money should not be paid until such acknowledgment be perfected. So, a lease by husband and wife, seised in fee in right of the wife, should be acknowledged by her; but slight circumstances may constitute an adoption of it by the wife surviving her husband (k).

Except where the estate is settled to her separate use.

We have already seen that a married woman, who is not restrained from anticipation, has, in Equity, in respect of her separate estate, the same power of disposition as if she were a *feme sole* (l). But it is only recently that the limits of the doctrine of the wife's separate estate, as regards her power of dealing with it during coverture, have been precisely defined. In the case of *Taylor* v. *Meads* (m), in which

(e) *Duke of Beaufort* v. *Glynn*, 25 L. T. 171.

(f) *Graham* v. *Jackson*, 6 Q. B. 811.

(g) See 56 Gen. Order of 7th Nov. 1853, and 16 & 17 Vict. c. 70, s. 134.

(h) *Billing* v. *Webb*, 1 De G & S. 716; *Lassence* v. *Tierney*, 1 Mac. & G. 572.

(i) *Franks* v. *Bollans*, L. R. 3 Ch. Ap. 717.

(k) *Toler* v. *Slater*, L. R. 2 Q. B. 42.

(l) *Suprà*, p. 10.

(m) 11 Jur. N. S. 166; 5 N. R. 348; 34 L. J. Ch. 203; and see *Pride* v. *Bubb*, L. R. 7 Ch. Ap. 64.

the prior conflicting authorities (*n*) were fully considered, Lord Westbury held that a married woman, not restrained from anticipation, has, as incident to her separate estate, and without any express power, an absolute right of disposition over her equitable fee by deed, not acknowledged under the Act, or by will; and it would seem that the interposition of trustees is not necessary to give her this right (*o*). There must, however, be clear proof of an intention to annex the separate use to the whole fee, and not merely to the life estate (*p*). Chap. XIII. Sect. 1.

Remarks on *Taylor* v. *Meads*.

The decision in *Taylor* v. *Meads*, though apparently the logical result of the doctrine, has not been universally approved; and in a later case (*q*), V.-C. Kindersley appears to have considered it the only binding authority for the proposition, that the *corpus* of real estate can be settled to the separate use of a married woman (*r*). There is certainly much to be said in favour of the view taken by Lord Romilly in *Lechmere* v. *Brotheridge* (*s*). If the original purpose of the doctrine is alone to be regarded, its operation may reasonably be restricted to the period of coverture; especially as a wider power of alienation, exerciseable by the married woman while under her husband's influence, may, in many cases, destroy the protection which it was the primary object of the equitable doctrine to afford. But the sounder view is conceived to be that the capacity to hold as separate estate carries with it, as an essential incident of property, a right of absolute alienation. Upon principle, this right ought to be as complete where the separate use is annexed to the fee, as where it is annexed only to the life

(*n*) *Lechmere* v. *Brotheridge*, 32 Beav. 353; *Buckell* v. *Blenkhorn*, 5 Ha. 131, 134; *Atchison* v. *Le Mann*, 23 L. T. 312; *Adams* v. *Gamble*, 11 Ir. Ch. Rep. 44, 269; 12 Ir. Ch. Rep. 102.

(*o*) *Hall* v. *Waterhouse*, 11 Jur. N. S. 361; 6 N. R. 20; a case of devise by the *feme covert*; but it is conceived she could only pass the *legal* fee, vested in her for her separate use, by a statute deed.

(*p*) *Troutbeck* v. *Boughey*, L. R. 2 Eq. 537; Lewin on Trusts, p. 553.

(*q*) *Troutbeck* v. *Boughey*, *ubi suprà*; but see now *Pride* v. *Bubb*, *ubi suprà*, where Lord Hatherley, C., approves the doctrine laid down in *Taylor* v. *Meads*.

(*r*) But see *Baggett* v. *Meux*, 1 Ph. 627.

(*s*) 32 Beav. 353; see judgment.

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estate: and its exercise would practically be denied to the married woman, if she could only dispose of her equitable fee settled to her separate use, with the concurrence of her husband and with the formalities prescribed by the Statute.

Separate estate of married woman under 33 & 34 Vict. c. 93.

By the 33 & 34 Vict. c. 93, s. 8, it is provided that where any freehold, copyhold, or customaryhold property shall *descend* upon any woman married after the passing of the Act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone are to be good discharges for the same (*t*). Under this section, a woman married after the passing of the Act has, unless controlled by settlement, the same proprietary rights over her life interest in the descended real estate as if she were a *feme sole*; and, apparently, the application of the section is not confined to lands which descend upon her after her marriage: but she is still unable, as before the Act, to dispose of the fee during coverture by will, or except by an acknowledged deed; and her husband's title by curtesy is not excluded. And now, when any freehold or copyhold hereditament is vested in a married woman as a bare trustee, she may convey or surrender the same as if she were a *feme sole* (*u*).

Acknowledgment, by whom to be taken.

The acknowledgment, when necessary, is to be made before one of the Judges of the superior Courts at Westminster, or—before the abolition of the office—a Master in Chancery, or before a County Court Judge (*x*), or before two of the perpetual Commissioners appointed under the Act (*y*), or—where by reason of residence beyond seas, or ill-health, or any other sufficient cause, the married woman shall be prevented from so acknowledging the deed—before special Commissioners to be appointed by the Court of Common Pleas (*z*). Where a commission had issued to persons sup-

Special commissioners appointed *nunc pro tunc*.

(*t*) The act came into operation on the 9th Aug., 1870.

(*u*) 37 & 38 Vict. c. 78, sect. 6.

(*x*) 19 & 20 Vict. c. 108, s. 23.

(*y*) Sect. 79.

(*z*) Sect. 83.

posed to be near a particular locality up the country in India, and, in consequence of their removal, the acknowledgment was taken before strangers, the Court, under the special circumstances, allowed the commission to be amended by inserting their names (a). When the Christian name of either the woman or the man is unknown, a commission may issue with the name in blank; but more than ordinary care must then be taken to verify the party by affidavit (b).

Certificate of acknowledgment to be made, verified, and filed.

The person or persons taking the acknowledgment must sign a memorandum and certificate in the forms prescribed by the 84th section of the Act. The certificate, with an affidavit verifying the same, is then to be filed in the Common Pleas: and thereupon, and not before (c), the deed will, as respects the married woman, take effect from the time of acknowledgment (d). The acknowledgment may, apparently, be taken at any time after execution; and in the case of a disentailing deed, it need not precede enrolment (e). When the certificate and affidavit are inconsistent with each other, the Court will not allow them to be filed (f); and therefore, of course, will not permit a certificate to be so amended as to make it vary from or alter the sense of the affidavit (g).

Defective certificate.

Where the certificate merely stated the belief of the Commissioners that the married woman was of full age at the date of the acknowledgment, instead of expressly certifying the fact, it was nevertheless allowed to be filed (h); and a description of the woman in the certificate as "Mary, the

(a) *In re Stubbs*, 5 Sc. N. R. 327.

(b) *In re Apperton* or *Atherton*, 1 C. B. 447; 3 Dowl. & L. 26; *In re Legge*, 15 C. B. 364.

(c) *Jolly* v. *Hancock*, 7 Exch. 820.

(d) Sects. 85 and 86.

(e) *Ex parte Taverner*, 1 Jur. N. S. 814; 24 L. T. Ch. 606; affirmed 1 Jur. N. S. 1194; 7 De G. M. & G. 627.

(f) *In re Dixon*, 4 C. B. 631.

(g) *In re Millard*, 5 C. B. 753; *Ex parte Witty*, 9 Dowl. P. C. 838; see as to interlineations, erasures, or omissions in the affidavit, *In re Worthington*, 5 C. B. 511; *In re Fagan*, *ibid.* 436; *Re Bingle*, 15 C. B. 449; *Anon.* 16 C. B. 574; *Re Partridge*, 1 Jur. N. S. 1140; an erasure in the jurat is fatal: *Re Tierney*, 15 C. B. 761.

(h) *Ex parte Wallis*, 6 Jur. N. S. 201.

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reputed wife of A. B., otherwise Mary S., spinster," has been held sufficient (*i*). The affidavit ought to be engrossed on parchment, but if written on paper will be accepted (*k*).

General Rules of Hilary Term, 1834.

The General Rules published by the Court of Common Pleas in Hilary Term, 1834, provide, that in case of an acknowledgment before Commissioners, one, at least, of such Commissioners shall be a person who is not interested in the transaction, or concerned therein as attorney, solicitor or agent, or clerk to any attorney, solicitor or agent so interested or concerned: and the Commissioners are to inquire of the married woman, separately from her husband and from the attorney or solicitor employed in the transaction, whether any provision is to be made for her in lieu of the interest which she gives up (*l*); and if so, are to satisfy themselves before taking the acknowledgment that such provision has been made by some deed or writing produced to them; or, if not made, then they are to require its terms to be reduced into writing, and verify the same by their signatures; and the affidavit (*m*) (which may be made by one of the Commissioners, although he be the solicitor employed in the transaction (*n*),) is to be in the form annexed to such General Rules; and it is only in exceptional cases that strict compliance with the rules will be dispensed with (*o*). When the certificate is filed, the deed, under a later Act (*p*) ceases to be impeachable on the ground of interest in the parties before whom it was acknowledged.

Separate examination of married woman.

Certificate lost before being filed.

Where a married woman acknowledged a deed before a

(*i*) *Ex parte Francis*, 5 C. B. 498.

(*k*) *Ex parte Carr*, 5 C. B. 496; see *In re Foster*, 7 C. B. 124.

(*l*) As to taking an acknowledgment from a deaf and dumb woman, *In re Harper*, 6 Man. & G. 732.

(*m*) The affidavit must speak positively to the fact of her having attained majority: *In re Coverley* 8 Sc. 147; and see *Ex parte Wallis*, 6 Jur. N. S. 201.

(*n*) *In re Scholefield*, 3 Sc. 657; but see *Ex parte Jane Menhennet*, L. R. 5 C. P. 16.

(*o*) *Ex parte Stevens*, 3 Hodges, 12; *re Hannah Packer*, L. R. 5 C. P. 424; and see *re Isabella Howard*, L. R. 9 C. P. 347; *re Julia Ashcroft*, *ib.*, where the acknowledgment was taken abroad.

(*p*) 17 & 18 Vict. c. 75. The Act is retrospective. See *Re Ollerton*, 15 C. B. 781; and *Bancks* v. *Ollerton*, 10 Exch. 168, which gave rise to it.

judge, and the certificate, duly signed, was lost before it was lodged with the proper officer for the purpose of being filed, the Court of Common Pleas considered that they had no power to direct the judge to make a fresh certificate; and expressed no opinion as to the validity of such a certificate if given (q). It appears, from a subsequent report, that the married woman afterwards reacknowledged the deed (r).

Acknowledgment in consideration of money paid to married women allowed.

The Court will allow the acknowledgment to be taken in consideration of a sum of money actually paid to the married woman, if the sum so paid be too small (*e.g.*, 40*l.*) to form the subject of a settlement (s); and the usual inquiry as to a provision is unnecessary on a compulsory sale to a public company (t).

As to the affidavit where acknowledgment is taken abroad.

When the acknowledgment has been taken abroad, the Court has refused to dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it were distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule (u): upon this principle, the Court has received an affidavit sworn before a British Consul, upon evidence either that he was, according to the *lex loci*, competent to administer an oath (x), or that there was no local authority within reach who possessed such a power (y): so, also, it has received, under similar circumstances, affidavits sworn before the "Provisional British Consul at the Society Isles" (z): the "Minister of the British Chapel at Moscow" (a); a "Political

(q) *Re a Married Woman*, L. R. 2 C. P. 511.

(r) L. R. 4 Ch. Ap. 36.

(s) *Ex parte Webber*, 5 C. B. 179.

(t) *In re Foster*, 7 C. B. 120.

(u) *In re Crawford*, 4 C. B. 626; and see *In re Eady*, 6 Dowl. P. C. 615; *In re Pearsall*, 9 Dowl. P. C. 46; *Ex parte Shaw*, *ibid*, 839; *In re Schiff*, 1 Dowl. & L. 911; *Ex parte Way*, *ibid*. 950; *In re Street*, 2 C. B. 364; and as to the Court receiving an affidavit verifying an acknowledgment taken abroad, notwithstanding formal defects, see *re Isabella Howard*, L. R. 9 C. P. 347; *re Julia Ashcroft*, *ib.*

(x) *In re Barber*, 4 Dowl. P. C. 640, does not seem to be an authority for the general power of a Consul. See *Ex parte Hutchinson*, 5 C. B. 499; *Ex parte Cooper*, 16 C. B. 225.

(y) *Dary* v. *Maltwood*, 2 Man. & G. 424; *Ex parte Daly*, 9 Dowl. P. C. 380.

(z) *In re Darling*, 2 C. B. 347.

(a) *In re Pickersgill*, 6 Man. & G. 250.

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Agent up the country in India" (b); and "the Chief Magistrate at Corfu" (c); and a certified copy of an Act of the "Imperial Royal Civil Tribunal of Milan" (d); but it has refused to receive an affidavit sworn before the British Minister at Florence, it not appearing that there was no local authority competent to take the affidavit (e). But now every British ambassador, envoy, minister, charge d'affaires, or secretary of embassy or of legation, exercising his functions in any foreign country, and every British vice-consul, acting consul, proconsul, or consular agent, as well as every consul-general or consul exercising his functions in any foreign place, is empowered to administer in such country or place any oath, or to take any affidavit (f). It is not essential that the affidavit should state where the acknowledgment was taken (g).

Where there has been delay in filing the certificate.

Although several years may have elapsed since the acknowledgment, the Court will, where the mistake has arisen from inadvertence, and no person is likely to be prejudiced (h), allow the certificate to be filed; but will require a fresh affidavit (i).

Mode of assuring married woman's interest in copyholds.

Upon a sale of copyholds, a surrender to the use of the purchaser, by the copyholder's wife, with his consent, after she has been privately examined, will bar her right to free-bench, if any exist by special custom; although, at the date of the surrender, the purchaser has no legal estate in the premises (k). Upon the sale of her copyhold property, if she have the legal estate, the conveyance must be by surrender: if her estate be merely equitable, a surrender by her and her husband, after she has been privately examined, is binding as if her estate were legal (l); or her equitable

(b) *In re Stubbs*, 5 Sc. N. R. 327.

(c) *In re Hurst*, 15 C. B. 410.

(d) *In re Clericetti*, 15 C. B. 762.

(e) *In re Dunsany*, 7 C. B. 119.

(f) 18 & 19 Vict. c. 42.

(g) *In re Partridge*. 1 Jur. N. S. 1140.

(h) *Re Edge*, L. R. 1 C. P. 533.

(i) *Ex parte Gardner*, 3 C. L. R. 341, 343; *In re Warne*, 15 C. B. 767.

(k) See *Wood* v. *Lambirth*, 1 Ph. 8.

(l) 3 & 4 Will. IV. c. 74, s. 90; her surrender may be taken by an *infant* deputy steward, *Eddlestone* v. *Collins*, 3 De G. M. & G. 1.

estate will pass by a mere deed acknowledged under the Act (m): so also as regards her equitable estate in customary freeholds (n).

As to her acknowledged deed passing her reversionary interest in proceeds of sale, &c.

So, notwithstanding a doubt which has been entertained (o), it is clearly settled that an acknowledged deed will pass a married woman's reversionary interest in the proceeds of sale of real estate subject to a trust for sale, but remaining unsold (p); or in money subject to an absolute trust for investment in land (q); but not in money to be laid out in land, *or otherwise* (r). So, her fine, or now her acknowledged deed, will bind her future interest and right of renewal in renewable leaseholds (s); and her contingent remainders (t). But acknowledgment is essential in order to bind her equitable interest not settled to her separate use: *e.g.*, a married woman *cestui que trust*, concurring in, but not acknowledging, the conveyance, upon a purchase by her own trustee for sale, is not bound (u).

As to her terms for years.

We have seen that an assignment, merely by the husband, of her legal terms for years, is sufficient; but that, as respects her equitable chattels real,—including even the equity of redemption in a legal term mortgaged by her husband in her right,—it is prudent to require that she shall join in and acknowledge the assignment (x): and when the husband purports to convey, for the continuance of the coverture, his wife's freeholds, a like precaution seems to be requisite if the legal estate be outstanding, or

(m) Sect. 77.

(n) *Torbuck* v. *Herviton*, 19 L. T. 348.

(o) *Hobby* v. *Collins*, 4 De G. & S. 289, reported as *Hobby* v. *Allen*, 20 L. J. N. S. 199, V.-C. K. B.; 15 Jur. 835; see an article in 15 Jur. pt. 2, p. 214; and Sug. Stat. 240.

(p) See *May* v. *Roper*, 4 Sim. 360; 1 Jarm. on Wills, 568, n.; *Forbes* v. *Adams*, 9 Sim. 462.

(q) 3 & 4 Will. IV. c. 74, s. 77.

(r) *Smithwick* v. *Smithwick*, 5 L. T. N. S. 23.

(s) *Dickens* v. *Unthank*, 1 Jur. N. S. 916.

(t) *Crofts* v. *Middleton*, 8 De G. M. & G. 122; overruling V.-C. Wood, 1 Jur. N. S. 1133; 2 K. & Jo. 194.

(u) *Franks* v. *Bollans*, L. R. 3 Ch. Ap. 717.

(x) *Suprà*, p. 9.

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in reversion expectant on a term of years created for a limited purpose (*y*).

In *Wortham* v. *Pemberton* (*z*), it was held that the estate of a *feme covert*, tenant in tail in possession, subject to a jointure term, was equitable during the joint lives of herself and her husband, or during the continuance of the term, so as to entitle her to a settlement: the ground of this decision being, that the jointure term interposed such a legal estate as enabled the Court to deal with the property while it remained subject to the term; but it may be doubted whether this decision can be supported.

Concurrence of husband when dispensed with.

By the 91st section of the Act, it is provided, that if a husband shall, in consequence of his being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed or making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent (*a*) or by sentence of divorce, or in consequence of being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by the act or otherwise: and all deeds, &c., by the wife, pursuant to such order, are to be executed, &c., by her, as if a *feme sole*; and when executed, &c., shall, but without prejudice to the husband's rights as then existing independently of the Act, be as good and valid as they would have been if he had concurred: but the provision is not to extend to cases in

(*y*) *Hanson* v. *Keating*, 4 Ha. 1; *Wortham* v. *Pemberton*, 1 De G. & S. 644; *Wilkinson* v. *Charlesworth*, 10 Beav. 324.

(*z*) 1 De G. & S. 644; and see Sug. 560.

(*a*) As to what constitutes living apart by mutual consent, see *In re Alice Rogers*, L. R. 1 C. P 47.

which the Lord Chancellor, or other the persons intrusted with the Great Seal, or the Court of Chancery, shall be protector of a settlement in lieu of the husband. This clause has been held to extend to copyholds, over-riding the 77th sect. (*b*). It does not appear to be so expressed as to render acknowledgment by the married woman unnecessary, although such was probably the intention. The order has been made in cases where the husband, having committed an act of bankruptcy, has absconded and gone abroad, and has not since been heard of (*c*); even although the wife has married again (*d*); or where he is under transportation for felony (*e*); or is in prison abroad (*f*); or has left for Australia, in distress, and with no intention of returning (*g*): so, where, although not a lunatic (*h*), he was in a state of complete imbecility (*i*): so where he was living apart from his wife, and refused to concur in conveying property vested in her as a trustee (*k*); or in conveying her own property, either at all (*l*), or unless part of the purchase-money were paid to him (*m*): but the Court has refused an order in cases of, what appeared to be, his mere temporary absence from the country; as where the wife's affidavit stated that he had gone to New Zealand, and when last heard of, was employed in a Government vessel, and that she believed that

(*b*) *Ex parte Shirley*, 5 Bing. N. C. 226.

(*c*) *Ex parte Gill*, 1 Bing. N. C. 161; *Ex parte Stone*, 9 Dowl. P. C. 843; *Ex parte Denny*, 2 C. L. R. 1755; *Ex parte Hulme* and *Ex parte Cobham*, 3 C. L. R. 149; *Ex parte Lord*, *ibid.* 37; the affidavit must be made by the wife herself; *In re Bruce*, 3 Sc. N. R. 592; 9 Dowl. P. C. 840; *Ex parte Williams ibid.* 72, As to erasures, &c., *vide suprà*, p. 573. n. (*g*).

(*d*) *Ex parte Yarnall*, 17 C. B. 189.

(*e*) *Ex parte Wimbush*, 3 C. L. R. 340.

(*f*) *Re Albinia*, 4 W. R. 208.

(*g*) *In re Kelsey*, 16 C. B. 197.

(*h*) As to what evidence of existing lunacy is sufficient, see *In re Turner*, 3 C. B. 166; and see *re Murphy*, 5 Scott, N. R. 166; 4 Man. & G. 635.

(*i*) *In re Woodall*, 3 C. B. 639.

(*k*) *In re Mirfin*, 4 Man. & G. 635.

(*l*) *Ex parte Snelling*, 3 C. L. R. 149; *In re Perrin*, 14 C. B. 420.

(*m*) *In re Woodcock*, 1 C. B. 437; *Re Trendry*, 5 W. R. 322. For form of order enabling wife to convey her own estate, see *Ex parte Duffill*, 6 Sc. N. R 30; but the Court will not sanction any particular form of conveyance, but will only give a general authority to convey: *In re Woodall*, 3 C. B. 639.

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he never intended to return (*n*): so, when it stated, that the husband, a seaman, had gone abroad, and that she had not heard of him for many years and believed him dead, no sufficient grounds for such belief being stated (*o*): so, where he was stated to be living separate from his wife, in London, with another woman (*p*).

Married woman may by acknowledged deed convey contingent interests, and disclaim.

And the disposing power of a married woman under the above Act, is, by the 8 & 9 Vict. c. 106, extended to contingent and other similar interests, and to rights of entry; and she is also thereby enabled to disclaim, by an acknowledged deed under the 3 & 4 Will. IV. c. 74, any estate or interest in tenements or hereditaments in England, of any tenure (*q*).

Malins' Act.

And by the 20 & 21 Vict. c. 57, her power of disposition by an acknowledged deed is extended to her reversionary interests in personalty under any instrument executed after the 31st December, 1857, and not being a settlement or agreement for a settlement made on her marriage. As we have already seen (*r*) a married woman, who is judicially separated from her husband, has the same power of disposition over her after-acquired property, as if she were a *feme sole*.

Married woman judicially separated.

As to assignment of terms for years by executors or administrators.

An assignment of leaseholds, or any other chattel interest in real estate, by one of several executors or administrators, is valid (*s*): so, also, is an assignment by an executor who dies before probate; but the will must eventually be proved; as the probate copy is the only evidence of the appointment

(*n*) *Ex parte Gilmore*, 3 C. B. 967; *In re Smith*, 16 L. J., N. S., C. P. 168; but see *In re Kelsey*, 16 C. B. 197; *Re Spiers* 17 C. B. 176; *In re Sophia Martin*, 4 Jur. 559.

(*o*) *Ex parte Taylor*, 7 C. B. 1. Of course the order was applied for as a means of avoiding the necessity of proving the death as a matter of title, and it was eventually made, on further evidence: but the affidavit must describe her as his "wife" and not his "widow;" *Ex parte Sparrow*, 12 C. B. 334.

(*p*) *Ex parte Parker*, 3 C. L. R. 148; *Re Squires*, 25 L. J. C. P. 55.

(*q*) See sects. 6 and 7 of the Act.

(*r*) *Suprà*, p. 10.

(*s*) *Simpson* v. *Gutteridge*, 1 Madd. 609; *Sucsby* v. *Thorne*, 1 Jur. N. S. 536; affirmed *ib.* 1058.

of the executor (*t*): but an assignment by a person assuming to act as administrator, and who subsequently obtains letters of administration, is void (*u*).

Power for promoters of public undertakings to convey to themselves upon refusal or default of owners.

By the Lands Clauses Consolidation Act, if, upon the deposit in the Bank of the purchase-money or compensation agreed or awarded to be paid in respect of lands purchased or taken by the promoters of the undertaking, the owners or statutory owners fail to convey the land upon request, the promoters are authorized to execute a deed-poll, which will have all the effect of a conveyance by the owners or statutory owners (*x*): similar powers are also conferred upon the promoters of the undertaking, in the several events of the owners (*y*) refusing to convey, or failing to make a title, or not being discoverable (*z*).

Trustee bound to convey at request of *cestui que trust*.

Where a trustee of an outstanding legal estate refuses in a plain case to convey at the request of a party entitled to a conveyance, he will, if a bill be filed against him, be fixed with costs (*a*): so, where a trustee for sale with the consent of his *cestui que trust*, refused without sufficient reason to concur in a sale which they had agreed upon, he was ordered to pay the costs of a suit for his removal from the trusteeship (*b*): and where a party has accepted a trust, he cannot, it is conceived, justify his refusal to convey on the ground that no estate is in fact vested in him. A trustee, however, when required to convey the estate on the ground of the trusts having terminated, is entitled to clear and satisfactory evidence of such being the fact (*c*). And he cannot be required from time to time to divest himself of different parcels of the trust estate, or to convey by other words and

But only by description under which he himself took estate.

(*t*) *Brazier* v. *Hudson*, 8 Sim. 67.

(*u*) Wms. on Executors, 6th ed. 390; *Morgan* v. *Thomas*, 8 Exch. 302.

(*x*) See sect 75.

(*y*) *Quære*, whether this includes statutory owners. See Frend and Ware's Rail. Conv. 83, n.

(*z*) See sects. 76, 77. See, on the construction of a clause in a private Act, similar to the 76th section, *Doe* v. *Manchester*, *Bury*, *and Rosendale Rail. Co.*, 9 Jur. 949.

(*a*) *Willis* v. *Hiscox*, 4 Myl. & Cr. 197; *Hampshire* v. *Bradley*, 2 Coll. 34.

(*b*) *Palairet* v. *Carew*, 34 Beav. 564.

(*c*) *Holford* v. *Phipps*, 3 Beav. 434; See as to a protector; *Buttanshaw* v. *Martin*, Johns, 8

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descriptions than those by which the conveyance was made to himself (*d*); and the same is the rule in the case of a mortgage (*d*).

Concurrence of mortgagee should be obtained in conveyance of equity of redemption.

The concurrence of the mortgagee in the conveyance should, where possible, be obtained, even where the mortgage is intended to be kept on foot; for as a mortgagee with several securities on two different estates is entitled to hold both until full payment of all that is due to him, the purchaser of the equity of redemption of one estate may have to redeem the mortgage subsisting on the other (*e*).

Mortgagee, when bound to convey.

And a mortgagee cannot be compelled to re-convey before the time fixed for redemption, although he be tendered his principal with interest up to that time (*f*): nor, if the day fixed for redemption be allowed to elapse, can he subsequently be compelled to convey without either six months' notice or six months' interest paid in advance (*g*). But an incumbrancer, although not a party to the contract, may so act as to bind himself to concur in a sale of part only of the property (*h*). Whether a stipulation purporting to postpone the mortgagor's right to redeem for a period of twenty years will have that effect seems to have been considered doubtful (*i*). And where a mortgagee has accepted a tender of his principal, interest, and costs from a person having a partial interest and entitled to redeem, he is bound to convey to him the legal estate and to deliver up the title deeds, although there may be other claimants of the equity of

(*d*) *Goodson* v. *Ellison*, 3 Russ. 594.

(*e*) *Farebrother* v. *Woodhouse*, 23 Beav. 18; *Tweedale* v. *Tweedale*, 23 Beav. 341; *Tassell* v. *Smith*, 2 De G. & Jo. 713; *Neve* v. *Pennell*, 2 H.&M. 170; *Selby* v. *Pomfret*, 3 De G. F. & Jo. 595. And see *Vint* v. *Padgett*, 1 Giff. 446; 2 De G. & Jo. 611, a strong case; *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Loveday* v. *Chapman*, V.-C. Hall, 15th March. 1875.

(*f*) *Brown* v. *Cole*, 14 Sim. 427; and compare *Harding* v. *Pingey*, 10 Jur. N. S. 872, case of trust for securing the mortgage debt.

(*g*) As to the necessity of such a notice depending on custom rather than law, see *Browne* v. *Lockhart*, 10 Sim. 420, 424; and see *Letts* v. *Hutchins*, L. R. 13 Eq. 176, where the six months' interest was disallowed.

(*h*) See *Crosse* v. *Revy*, *Society*, 3 De G. M. & G. 712; *Rowe* v. *May*, 18 Beav. 613.

(*i*) *Cowdry* v. *Day*, 5 Jur. N. S. 1199; 1 Giff. 316.

redemption (k); but the conveyance should in such a case reserve the equities of the other persons interested (l).

Assignee in bankruptcy not consulted as to sale, held entitled to a reference as to its propriety.

Where a dormant assignee in bankruptcy had not been consulted as to the sale of part of the estate, and had reasonable cause to doubt whether it would be beneficial, it was held, that he could not be compelled to execute the conveyance, without a previous reference as to the propriety of the sale (m).

Conveyance of legal estates from trustees, &c., formerly procurable under 1 Will. IV. c. 60; repealed by "The Trustee Act, 1850."

In many cases, a conveyance of the legal estate, which could not otherwise have been procured without suit, might, prior to the first November, 1850, have been obtained under the provisions of the 1 Will. IV. c. 60, the 4 & 5 Will. IV. c. 23, and the 1 & 2 Vict. c. 69. These Acts (n) have been repealed, and their principal provisions have been re-enacted, along with considerable additions, by the 13 & 14 Vict. c. 60 (cited as the Trustee Act, 1850). By this Act (o), as amended by the 15 & 16 Vict. c. 55, the Lord Chancellor sitting in lunacy, (as respects matters within that jurisdiction (p),) the Court of Chancery, and the local Courts of Lancaster and Durham (as respects lands within the palatinate jurisdiction (q), are respectively enabled in the several cases of—

Under which the Court may, in the several cases of —

(k) *Pearce* v. *Morris*, L. R. 8 Eq. 217; affirmed with variations, L. R. 5 Ch. Ap. 227.

(l) *Pearce* v. *Morris*, L. R. 5 Ch. Ap. 227.

(m) *Ex parte Underhill*, 3 Mon. & A. 660.

(n) As to the effect of which, see Hill on Trustees, 275, *et seq.*; and Coote on Mortgages, 3rd ed. 359, *et seq.*; and Sug. 225.

(o) See sect. 1 for the extended meaning given throughout the Act to the expressions "lands," "seised," "possessed," "contingent right," "convey," "conveyance," "trust," "trustee," "lunatic," "person of unsound mind," "devisee," and "mortgagee." The word "land" has been held to include rent-charges (Seton, 811, *Re Harrison*); an assignee of a bankrupt (*Re Joyce*, L. R. 2 Eq. 576), the executrix of a surviving trustee (*Re Ellis*, 24 Beav. 426), the heir of a deceased mortgagee (*Re Underwood*, 3 K. & J. 745), and the husband of a feme covert trustee (*Re Wood*, 3 De G. F. & Jo. 126), have been held to be "trustees." See Morgan's Chancery Acts and Lewin on Trusts, 6th edition, pp. 846, *et seq.* for cases under this Act; and see the Extension Act, 1852.

(p) Which does not extend to lands in Ireland; *In re Davies*, 3 Mac. & G. 278. The Lords Justices sitting in lunacy can make the order; *Re Waugh*, 2 De G. M. & G. 279, and see 15 & 16 Vict. c. 87, s. 15.

(q) Sect. 21.

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a lunatic or infant, being a trustee or mortgagee;

A lunatic, or person of unsound mind, or infant, being seised or possessed of any land upon any trust or by way of mortgage (*r*), or entitled to any contingent right in any lands upon any trust, or by way of mortgage (*s*);

or of a trustee, being out of jurisdiction or not to be found;

Or of any person, solely or jointly with any other person or persons, seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found (*t*);

or of its being uncertain which of several trustees was the survivor;

Or of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust was the survivor (*u*);

or of its being uncertain whether last trustee be living or dead;

Or (where one or more person or persons shall have been seised or possessed of any lands upon any trust) of its not being known whether the trustee last known to have been seised or possessed be living or dead (*x*);

or of trustee dying without an heir;

Or of any person seised of any lands upon any trust having died intestate as to such lands without an heir, or having died and its not being known who is his heir or devisee (*y*);

(*r*) Sects. 3 and 7: seeas to lunatic vendors, 16 & 17 Vict. c. 70, s. 122. For cases under these sections, see *Re Saumarez*, 4 W. R. 658; *Re Arrowsmith*, 6 W. R. 742; *Re Ormerod*, 3 De G. & Jo. 249, and cases there cited; *Re Porter's Trusts*, 2 Jur. N. S. 349.

(*s*) Sects 4 and 8. See cases cited in last note. The costs of proceedings under this Act rendered necessary by the mortgagee becoming of unsound mind must be borne by the mortgagee where he is beneficially interested in the mortgage money; *Re Wheeler*, 1 De G. M. & G. 436; *Re Stuart*, 1 De G. & J. 319; *Hawkins* v. *Perry*, 25 L. J. Ch. 656: but the mortgagor is not entitled to his costs of appearance out of the lunatic's estate, *Re Phillips*, L. R. 4 Ch. Ap. 629. In all other cases the costs must be paid by the mortgagor; *Re Stuart*, *ubi suprà*, *Re Jones*, 2 De G. F. & Jo. 554; *Re Rowley*, 1 N. R. 251.

(*t*) Sects. 9 to 12. See *Lechmere* v. *Clamp*, 31 Beav. 578; *Re Marquis of Bute's Will*, Johns. 15.

(*u*) Sect. 13, "Land," in this and the two following sections does not include "leaseholds;" see *Re Harvey*, Seton, 819; but see *Re Mundel*, 8 W. R. 683; and as to a vesting order as to leaseholds in the appointment of new trustees under the 34th sect. see *Re Mundel's Trust*, 6 Jur. N. S. 880; *Re Robinson's Will*, 9 Jur. N. S. 885.

(*x*) Sect. 14.

(*y*) Sect. 15. See *Wilks* v. *Groom*, 2 Jur. N. S. 1077.

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Or of lands being subject to a contingent right in any unborn person or class of persons, who, upon coming into existence, would, in respect thereof, become seised or possessed of such lands upon any trust (*z*);

or of contingent right being claimable by unborn trustee;

Or of a person jointly or solely seised or possessed of any lands, or entitled to a contingent right therein, upon any trust, being demanded by a person entitled to require a conveyance, assignment, or release of the same respectively, or his agent, to convey, release, or assign the same, but wilfully refusing or neglecting to convey or assign the said lands (*a*) for the space of twenty-eight days next after such demand (*b*):—to make an order vesting such lands in such person or persons in such manner and for such estate, or releasing the lands subject to such contingent right therefrom, or disposing of the same, as the Court shall direct: and the order is in itself to operate as an assurance.

or of trustee refusing to convey, &c.;

make a vesting or releasing order, which is to operate as an assurance.

And where any mortgagee shall have died without having entered into the possession, or into the receipt of the rents and profits (*c*) of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, the Court may make an order vesting such lands in such person or persons, in such manner, and for such estate as the Court shall direct, in case—

And may, under certain circumstances, make a vesting order in respect of mortgaged lands in cases of

An heir or devisee of such mortgagee shall be out of the jurisdiction, or cannot be found (*d*);

heir of devisee being out of jurisdiction or not to be found;

Or an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of

or refusing to convey

(*z*) Sect. 16.

(*a*) "Or to release such contingent right," seems omitted.

(*b*) 15 & 16 Vict. c. 55, s. 2, repealing ss. 17 and 18 of former Act; on which see *Rowley* v. *Adams*, 14 Beav. 130.

(*c*) Sect. 19. And see *re Boden's Trust*, 1 De G. M. & G. 57; *re Hewitt*, 27 L. J. N. S. (Ch.) 302.

(*d*) See *Re Skitter's Mortgage Trusts*, 4 W. R. 791; *Re Lea's Trusts*, 6 W. R. 482; *Re Hewitt*, *ubi suprà*.

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such lands, or his agent, having stated in writing that he will not convey the same; or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent;

or of survivor of several devisees being unknown;

Or it shall be uncertain which of several devisees of such mortgagee was the survivor;

or of its being uncertain whether heir or surviving devisee be alive;

Or it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead;

or of no heir or devisee existing or being known.

Or such mortgagee shall have died intestate as to such lands, and without an heir; or shall have died, and it shall not be known who is his heir or devisee (*e*);

And the order is itself to have the effect of an assurance (*f*).

Court may appoint a person to convey, &c., instead of making vesting order.

And the Court may, in every case, instead of making a vesting or releasing order, appoint a person to make a conveyance, assignment, release, or disposition of the lands or contingent interest; which, when duly made, is to have the effect of a vesting or releasing order (*g*).

As to copyholds.

As respects copyhold or customary lands, a vesting order, if made with the consent of the lord or lady of the manor, is sufficient to pass the lands without surrender or admittance; and it appears that in practice such consent is always required by the Court (*h*); and where it appoints a

(*e*) See *Re Minchin's Estate*, 2 W. R. 179.

(*f*) It was held that the Court cannot under these provisions vest the legal estate, subject to redemption, in the administrator of an intestate mortgagee in fee, whose heir is unknown, the debt remaining unpaid: *Re Meyrick*, 9 Ha. 116; but this has been overruled: *Re Boden*, 1 De G. M. & G. 57; *King's Mortgage*, 5 De G. & Sm. 644.

(*g*) Sect. 20. For form of conveyance, see *Ex parte Foley*, 8 Sim. 395; and as to the form of order, see *Seton*, 794, 799.

(*h*) See *Cooper* v. *Jones*, 2 Jur. N. S. 59; he must either appear and consent, or give a certificate of consent; which must be verified by affidavit, *S. C.*; and see *Ayles* v. *Cox*, 17 Beav. 584; and see *Cooper* v. *Jones*, *ubi suprà*.

person to convey such lands, such person may do all acts and execute all instruments for the purpose of completing the assurance (*i*), and which are to be effective accordingly.

Court may declare what parties are trustees of lands comprised in any suit for specific performance, &c.

And where any decree shall be made by any Court of Equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, such Court may declare that any of the parties to the suit are trustees of such lands, or any part thereof, within the meaning of the Act: or may declare, concerning the interests of unborn persons who might claim under any party to such suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of the Act: and thereupon the estates, rights, and interests of such persons, born or unborn, may be dealt with by order under the Act (*k*); and by the Partition Act, 1868 (*l*), the Court may make a similar declaration, where in suits for partition it directs a sale, instead of a division of the property.

Where trustee becomes bankrupt.

Under the Bankruptcy Act, 1861, where the bankrupt was as trustee seised, possessed of, or entitled to any real or personal estate, the Lord Chancellor had power on the petition of the person entitled in possession to the receipt of the rents, &c., to order a conveyance or transfer by the assignees upon the trusts subsisting at the date of the bankruptcy (*m*). This enactment had no application where the property was vested in the bankrupt as a bare trustee, and consequently did not pass to his assignees; and the

(*i*) Sect. 28.
(*k*) Sect. 30.
(*l*) 31 & 32 Vict c. 40, s. 7.
(*m*) See 24 & 25 Vict. c. 134 Schedule G.

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mere fact of bankruptcy was in some cases held an insufficient ground for appointing a new trustee in his stead under the Trustee Act, 1850 (n). But under the Bankruptcy Act of 1869, the operation of the 32nd section of the Trustee Act, 1850, is extended so as to authorize the Court of Chancery to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) in cases where it appears expedient to do so (o).

Under the recent Act.

Certain allegations made evidence of facts alleged, if order made thereon.

And under the Trustee Act (p), whenever an order shall be made for the purpose of conveying or assigning any lands, or of releasing or disposing of any contingent right, and shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction, or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the fact of an order being made upon such an allegation shall be conclusive evidence of the matter so alleged, in any Court of Law or Equity, upon any question as to the legal validity of the order; but this is not to prevent the Court from directing a reconveyance, &c., if the order is shown to have been improperly obtained.

No escheat of trust and mortgage estates.

And a subsequent section (q) re-enacts the 3rd and 5th sections of 4 & 5 Will. IV. c. 23, preventing the escheat of property held upon trust or mortgage.

Stamp duty on vesting orders.

By section 13 of 15 & 16 Vict. c. 55, vesting and releasing orders, operating as conveyances, are subjected to stamp duty as such.

(n) *Re Bridgman*, 1 Drew. & Sm. 104; but see *Harris* v. *Harris*, 29 Beav. 107.

(o) 32 & 33 Vict. c. 71, s. 117; see *Coombes* v. *Brookes*, L. R. 12 Eq. 61.

(p) Sect. 44: these provisions as to evidence do not seem to apply to orders by the Palatinate Courts.

(q) Sect. 46.

Interests of vendor, how far capable of being dealt with under Act.

It was observed, in the two first editions of this work, that the words "trust" and "trustee," as defined in the interpretation clause of the Act, would include the case of a vendor who had entered into a valid and subsisting contract for sale, or his representatives; but that the 30th section (r) seemed to show that it is not intended that a vendor's interests shall be dealt with under the Act, unless there have been a decree for specific performance, or an express declaration of trust (s): and this has since been so decided (t): nor does the Act enable the Court to vest in a purchaser of leaseholds from a mortgagee with a power of sale, a nominal reversion left in the mortgagor, when the mortgage contains a mere covenant that upon a sale being made the mortgagor will assign the reversion as the purchaser may require (u): but it is conceived that it is otherwise, where there is the usual express declaration of trust of the nominal reversion (x).

Cases where without suit the vendor or his heir has been held a trustee for the purchaser.

Where, however, on a sale of copyholds, the vendor had received the purchase-money and covenanted with the purchaser for the surrender of the property, but died before any surrender was made, the Court held on petition that the customary heir, who was under disability, was a trustee for the purchaser, and appointed a person to convey on his behalf (y); and in one case, where a vendor to a railway company of land within their compulsory powers died before the title was accepted, his infant devisee was held to

(r) Cited *suprà*, p. 587.

(s) See *Re Dickinson*, 17 L. T. 231, V.-C. K. B.; and under the 1 Will. IV. c 60, *Ex parte Williams*, 11 Sim. 54; *Re Weeding*, 4 Jur. N. S. 707; *Cust* v. *Middleton*, 9 W. R. 242.

(t) *Re Carpenter*, Kay, 418; and see *Re Burt*, 9 Ha. 289: and as to lunatics, 16 & 17 Vict. c. 70, s. 122; and see *Re Weeding* and *Cust* v. *Middleton*, *ubi suprà*, and cases cited, Seton, 892.

(u) *Re Propert*, 22 L. J. Ch. 948. It is singular that V.-C. Wood refers to this case (see Kay, 420), as if there had been an express declaration of trust, instead of a mere agreement to assign.

(x) See Dav. Conv. vol. ii. pp. 589, 590, and *Re Collingwood*, 6 W. R. 536; but see remarks of V.-C. Wood, Kay, 420.

(y) *Re Cuming*, L. R. 5 Ch. Ap. 72, and see *Re Crowe's* mortgage, L. R. 13 Eq. 26, where a similar order was made against a mortgagor who refused to surrender.

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be a trustee under the Act, and a vesting order was obtained on petition, without any bill having been filed (z).

In one case, where a vendor, after tender of a conveyance settled by the judge, refused either to convey or to receive the purchase-money, he was declared a trustee within the meaning of the Trustee Acts: and, on the purchaser paying his purchase-money into Court, his solicitor was to execute the conveyance for the vendor (a).

Where, on a sale of copyholds, the vendor covenanted to stand seised thereof in trust for the purchaser, until the surrender should be made, he was held to be a constructive trustee within the Acts, without bill filed (b): so, also, the heir of a vendor who died before completion of a compulsory sale to a railway company (c): so, where an equitable reversionary interest in real estate had been sold and assigned to the purchaser, the legal interest, which had been improperly conveyed to the vendor, was, without suit, vested in the purchaser (d): so, where a testator directed his executors to sell and apply the proceeds, and afterwards himself contracted to sell, his heir was declared a trustee of the outstanding legal estate (e).

Heir of mortgagee held trustee for the legal personal representatives.

In a well-drawn mortgage, the power of sale usually provides that, if exercised by any person not seised of the legal estate, the person in whom the legal estate shall be vested shall convey as the person exercising the power shall direct. The effect of such a provision is to make the person seised of the legal estate a trustee for the parties entitled to the mortgage money: but, even without it, the executors of a mortgagee may obtain a vesting order as to the legal estate

(z) *Re Lowry's Will*, L. R. 15 Eq. 78; *sed quære* whether reconcileable with *Re Carpenter*, *ubi suprà*.

(a) *Warrender* v. *Foster*, V.-C. S. cited Seton, 892; and see *Ex parte Mornington*, 4 De G. M. & G. 537.

(b) *Re Collingwood*, 6 W. R. 536; and see *Re Cuming*, L. R. 5 Ch. Ap., 1872, where there does not appear to have been such a covenant.

(c) *Re Russell*, 12 Jur. N. S. 224; and compare *Re Lowry's Will*, L. R. 15 Eq. 78.

(d) *Re Wilkinson*, 12 W. R. 522.

(e) *Re Badrock*, 2 W. R. 386.

which has descended to his heir; and this, whether the mortgagee has or has not entered into possession (*f*).

Power of legal personal representatives to convey under 37 & 38 Vict. c. 78.

We may here remark that the power of conveying the legal estate, which is given by the 37 & 38 Vict. c. 78 (*g*), to the legal personal representatives of a mortgagee or bare trustee will, in cases falling within the statute, render it unnecessary to apply for a vesting order under the Trustee Act.

On foreclosure by equitable mortgagee.

We may also remark that in a foreclosure suit by an equitable mortgagee, the Court, in making the decree absolute, may add a declaration that the mortgagor is a trustee for the mortgagee, and make a vesting order (*h*); so, in a partition suit, an infant may be declared a trustee within the Acts of any estate and interest vested in him, in such portions as are allotted in severalty to the other parceners (*i*).

Section 2.

(2.) *As to the discharge of incumbrances.*

As to the discharge of incumbrances. Vendor liable for incumbrances and defects of title until conveyance executed;

Until the conveyance is executed by all necessary parties, the vendor remains liable in respect to all defects in title. He must, for instance, refund the purchase-money, if the purchaser having paid it, even although having taken possession, be evicted by an adverse claimant (*k*). So, if incumbrances be discovered, he must discharge them, or the purchaser himself may pay them off out of the unpaid purchase-money (if any) (*l*): and a person to whom the

(*f*) See *Re Skitter's Trust*, 4 W. R. 791, under the 9th section; *Re Keeler*, 11 W. R. 62, under the 15th section; *Re Boden's Trust*, 1 De G. M. & G. 57; *Re Lea's Trust*, 6 W. R. 482, under the 19th section.

(*g*) See sects. 4 and 5; and *vide suprà*, p. 16.

(*h*) *Lechmere* v. *Clamp* (No. 2), 30 Beav. 218; *S. C.* (No. 3), 31 Beav. 578; but see *Smith* v. *Boucher*, 1 Sm. & Giff. 72.

(*i*) *Bowra* v. *Wright*, 4 De G. & S. 265; and see 31 & 32 Vict. c. 40, s. 6, as to sales under the Partition Act 1868.

(*k*) *Cripps* v. *Reade*, 6 T. R. 606; *Johnson* v. *Johnson*, 3 Bos. & P. 162; *Jones* v. *Ryde*, 5 Taunt. 488, 491; *Aubry* v. *Keen*, 1 Vern. 472; Sug. 549; *secus* where the eviction is after conveyance, see *Thomas* v. *Powell*, 2 Cox, 394.

(*l*) Sug. 552.

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vendor has, for valuable consideration and without notice of any particular incumbrance, assigned the unpaid purchase-money, takes subject to the purchaser's right so to apply the same (m): but the purchaser, of course, cannot retain any part of it as an indemnity against a contingent charge, against which he has agreed to accept the vendor's covenant (n).

and (in case of a married woman) acknowledged.

It is conceived that, for the purpose of the above rules, mere execution of the conveyance by a married woman is insufficient; for she has still a *locus pœnitentiæ:* and that until acknowledgment by her, the vendor's liability to discharge incumbrances, or make good defects in title, continues to subsist: but this liability, it is conceived, does not subsist between acknowledgment and the filing of the certificate; inasmuch as it may be filed by the grantee.

Retention of incumbrances out of unpaid purchase-money after conveyance executed.

And in some cases, a purchaser may, even after the conveyance is executed, retain, out of unpaid purchase-money, the amount of incumbrances which then come to his knowledge (o). And a purchaser, with notice of an incumbrance which he intends to be discharged, should take care that this is done, or that satisfactory security for its being done is given to him before he pays his money. Where, on a sale by the Court, a purchaser, with knowledge of an incumbrance, and without waiting to have his requisitions in respect of it answered, accepted the title and took his conveyance, it was held that he was not entitled to look to the purchase-money, which he had paid into Court, as available for the discharge of the incumbrance (p).

As to succession duty.

The Succession Duty Act (q) has given rise to several questions in connection with the present subject. The first and most important one is, whether where land is in settlement,

(m) *Lacey* v. *Ingle*, 2 Phil. 413.

(n) *Vane* v. *Lord Barnard* (a case of a marriage settlement), Gilb. Eq. R. 6.

(o) *Vide infrà*, Chapter XIV.

(p) *Miller* v. *Pridden*, 3 Jur. N. S. 78.

(q) 16 & 17 Vict. c. 51.

e. g., limited to A. for life, with remainder to B. in fee, and A. and B. unite in selling the fee simple, the land will, in the hands of the purchaser, be subject to succession duty at the time at which B.'s estate in remainder would have become an estate in possession, had no sale been effected. This seems clearly the case, if the sale is effected by means of the concurrence of the remainderman, as above supposed; but not where the sale is made in exercise of a power overriding the limitations (*r*). Then comes the question, how, in the case above supposed, the duty must be borne as between the vendors and the purchaser. If the purchaser, when he entered into the contract, had no notice of the state of the title, it seems reasonably clear that he can insist on the duty being borne by the vendors; and even if he bought with notice of the property being in settlement, it seems to be doubtful whether if, as is usually the case, the contract were one entire contract for the purchase of the fee simple in possession—as distinguished from separate contracts for the purchase of the separate interests which in the aggregate make up the fee simple—the vendors might not still be required to discharge the duty. But if a purchaser contract for a reversionary interest, as such, he must be presumed to do so with a knowledge that he is buying a property which is *primâ facie* subject to the duty; and in such a case he cannot (*s*), in the absence of an express stipulation to the contrary in the contract, require the vendor to discharge it (*t*): and it is conceived that he may be called upon to covenant to pay it when due, and to indemnify the vendor against it. It has been held that no duty binds the land in the hands of a purchaser under a power of sale, in respect of the extinction of an annual charge, even although not overridden by the power (*u*).

(*r*) See s. 42.

(*s*) *Cooper* v. *Trewby*, 28 Beav. 194; and *vide suprà*, p. 277.

(*t*) See and consider *Barraud* v. *Archer*, 2 Sim. 433; 2 Russ. & M. 751; *Bliss* v. *Putnam*, 7 Beav. 40; *Hales* v. *Freeman*, 1 B. & B. 391; *Farwell* v. *Seale*, 18 L. J. 189.

(*u*) *Dugdale* v. *Meadows*, L. R. 9 Eq. 212, affd. L. R. 6 Ch. Ap. 501; see *Lord Hatherley's* judgment, which is rested entirely on the 42nd section, and does not advert to the 5th section.

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As to timber.

In purchasing an estate comprised in a past succession, and which has timber upon it, the future liability to succession duty, under the 23rd section of the Act in respect of monies to be received from *subsequent* sales of timber, should be borne in mind: it is conceived that in such a case the vendor is bound to procure an assessment of such future liability, and to pay the amount of the assessment. Of course he must produce a proper discharge for the duty, if any, which has become due in respect of sale of the timber cut by him prior to the contract.

As to trust estates vested in trustees apparently as absolute owners.

Where, as is commonly the case upon a purchase or loan by trustees, the conveyance or mortgage is taken in their names as joint tenants, without disclosing the trust, and death occurs, a difficulty is sometimes experienced in practice, by reason of the provision in the 3rd section of the Act; under which the accruer of interest by survivorship, by reason of the death of a joint-tenant, confers a succession on the survivors. In such a case, the disclosure of the trust may often be the only mode of satisfying a purchaser who persists in requiring to be assured that no duty is payable.

Implied application of purchase-money by purchaser of equity of redemption in possession.

Where a puisne incumbrancer contracted for the purchase of the estate free from incumbrances, and took possession, but did not pay his purchase-money, and afterwards bought in a prior incumbrance, it was held that he must, as in favour of the vendor's representatives, be considered to have applied the purchase-money, on the day on which he took possession, towards satisfaction of the incumbrances, *according to their priorities* (*x*): but this decision was reversed (*y*).

Quietus under 2 & 3 Vict. c. 11.

The 2 & 3 Vict. c. 11, s. 10, provided for the registration of a *quietus*, and the discharge of the Crown debtor or accountant from all subsisting and future liability to the Crown, except as to the rents and covenants in leases; and now, under the

(*x*) *Greenwood* v. *Taylor*, 14 Sim. 505.

(*y*) *Att.-Gen.* v. *Cox*, 3 H. L. C. 240.

23 & 24 Vict. c. 115, satisfaction of a registered Crown debt may be entered up by the Registrar, upon a certificate of the Commissioners, or of the principal officer of the public department holding the bond, being filed.

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The Lands Clauses Consolidation Act, 1845, enables promoters of undertakings to dispense with the concurrence of incumbrancers who refuse to receive their money, or to release, or who cannot make out a satisfactory title (z): and also provides for cases where part only of incumbered lands is required for the purposes of the undertaking.

Discharge of incumbrances under the L. C. C. Act, 1845.

(3.) *As to purchaser's liability to see to application of trust purchase-money.*

Section 3.

As to liability of purchaser from trustees to see to application of purchase-money.

Since the two earlier editions of this work, there have been two important enactments, which have materially affected the law as to the liability of a purchaser from trustees to see to the application of his purchase-money.

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 23, it is provided that "the *bonâ fide* payment to, and the receipt of, any person to whom any *purchase* or *mortgage* money shall be payable, upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof; unless the contrary shall be expressly declared by the instrument creating the trust or security."

Lord St. Leonards' Act.

By Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 29, it is provided that "the receipts in writing of any trustees or trustee for *any money* payable to them or him, by reason or in exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received; and shall effectually exonerate the persons paying such money from seeing to the application

Lord Cranworth's Act.

(z) See s. 108, *et seq.*; 115, *et seq.*

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thereof, or from being answerable for any loss or misapplication thereof;" but the powers given by the Act may be negatived by express declaration, and are restricted to instruments executed after the 28th August, 1860.

Remarks on statutory powers.

These statutory powers (which, it will be observed, are more comprehensive in the latter than in the former statute) have for the future, in cases falling within their scope, rendered the subject which we are now considering of little practical moment; but, as neither is retrospective, it is still necessary to consider in what cases, independently of legislative enactment, trustees are competent to give valid receipts.

The doctrine as to the liability of a purchaser from trustees to see to the application of his purchase-money cannot yet be considered to be precisely defined: but the general principles, which were enunciated by the author in former editions as the foundation of the rule, have been confirmed by later authorities, and are here again repeated.

Purchaser's exemption from liability to be tested by intention of author of trust.

Primâ facie, every purchaser from trustees is, in Equity, bound to see to the application of his purchase-money; and the question whether he is, in any particular case, exempt from this liability seems to be simply one of *intention* on the part of the author of the trust: or, in other words, the power of his trustees to give receipts depends solely upon the degree of confidence which he has, either expressly or impliedly, reposed in them.

As either expressed or implied.

This intention may, as before observed, be either expressed or implied. Expressed; as where the will or trust deed contains a clause which, in terms, empowers the trustees to give valid discharges for the purchase-money. Implied; as where the trusts are of such a nature as that a contrary intention cannot reasonably be attributed to the author of the trust.

Matters pos-

And if this intention be expressed, or can be implied, th

trustees, upon a sale apparently in pursuance of the trust, have, under all circumstances, a power to give receipts. Of course, it may be shown that the sale is in fact a breach of trust: but then the objection is to the sale itself, and is not a question of application of purchase-money.

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terior to the creation of the trust neither take away,

And, on the other hand, where this intention is not expressed, and cannot be implied, the mere fact that the parties beneficially interested at the time of sale are infants, or unascertained, or any other similar circumstance, will not enable the trustees to give a valid discharge; but the purchaser must see to the application of the money.

nor confer a power to give discharges.

For instance,—to consider, first, the question of implied intention, and what sufficiently indicates it—where the trust (*a*) is for payment of debts generally, or for payment of debts generally in priority to or along with specified debts, legacies, or annuities, the trustees take, by implication, a power to give discharges; for no purchaser upon a sale during the existence of general debts, could be expected to take an account of them (*b*). So, where the trust is for payment to a person or persons who *may* be unascertained, or under age, or subject to any other incapacity or inability to receive the purchase-money; and a sale during the existence of such uncertainty, minority, incapacity, or inability, seems contemplated by the author of the trust: for, if the trustees cannot receive the money, there would, upon a sale under such contemplated circumstances, be *no* hand to receive it (*c*). So, where the money "is to be applied upon

What circumstances attending the trust confer such a power by implication—trusts being for payment of debts

or in favour of unascertained or incompetent *cestui que trust*;

or requiring time and discretion;

(*a*) Including under the term, a fiduciary power of sale, such as is created by a mere charge of debts, although subject thereto the estate be devised over: *Dolton* v. *Hewen*, 6 Madd. 9.

(*b*) *Johnson* v. *Kennett*, 3 Myl. & K. 624; *Eland* v. *Eland*, 4 Myl. & C. 420; *Forbes* v. *Peacock*, 1 Ph. 717; *Page* v. *Adam*, 4 Beav. 269, 283; *Glynn* v. *Locke*, 3 Dru. & W. 11, 22; *Robinson* v. *Lowater*, 17 Beav. 592; affirmed, 5 De G. M. & G. 272; *Dowling* v. *Hudson*, 17 Beav. 248; *Re Langmead*, 1 Jur. N. S. 1058; 7 De G. M & G. 353; and see *Stroughill* v. *Anstey*, 1 De G. M. & G. 635.

(*c*) *Sowarsby* v. *Lacey*, 4 Madd. 142, *Lavender* v. *Stanton*, 6 Madd. 46; *Balfour* v. *Welland*, 16 Ves. 151; *Breedon* v. *Breedon*, 1 Russ. & M. 413.

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or where money is to be reinvested.

trusts which require time and discretion" (*d*); for no purchaser could be expected to involve himself therein. So, where the money is to be invested, it is sufficient if the purchaser see that this is done, and that a declaration of trust is executed (*e*).

So, executors can give good discharges;

So, executors can give a good discharge for the purchase-money of chattels real, although specifically bequeathed (*f*): for an appointment of an executor, is, in effect, a bequest to him of the personalty in trust to sell for the payment of general debts. And the same rule seems to apply to cases where executors take, either expressly or by implication, a power to sell freeholds or copyholds, and the proceeds of sale are to be applied by them in a mixed fund with the residuary personal estate (*g*): and, as respects chattels real, it has been held that any one of several executors can sell, and can give a good discharge for the entire purchase-money (*h*); although the power of either party to enforce specific performance of a contract entered into by less than the entire body of executors seems doubtful (*i*).

or any single executor.

In what cases no such power is implied.

But, on the other hand, where the trusts are for payment of the purchase-money, or some definite part of it, to some ascertained person or persons, whose incapacity or inability to receive the same at the time of sale does not appear to

(*d*) Sug. 659; citing *Doran* v. *Wiltshire*, 3 Sw. 699.

(*e*) Sug. 660.

(*f*) See *Ewer* v. *Corbet*, 2 P. Wms. 148; *Burting* v. *Stonard*, *ibid.* 150; *Andrew* v. *Wrigley*, 4 Bro. C. C. 125. But as the executor's assent vests the term in the legatee, it is desirable to have the latter's concurrence in the sale: see *Thomlinson* v. *Smith*, 1 Rep. t. Finch, 378; *Att.-Gen.* v. *Potter*, 5 Beav. 164; affirmed 9 Jur. 241; but see Coote on Mortgages, 3rd. edit. p. 153, n. (*e*). As to evidence of assent, see *Trail* v. *Bull*, 1 Coll. 352; 22 L. J. 1082; and *Cole* v. *Miles*, 10 Ha. 179; *Fenton* v. *Clegg*, 9 Exch. 680. Where the executor is himself the legatee, the title is clearly good; *Taylor* v. *Hawkins*, 8 Ves. 209; unless he be apparently selling for an improper purpose, *Elliot* v. *Merryman*; Barn. 78, 81; *Cole* v. *Miles*, *supra*; and see *Brettle* v. *Burdett*, 2 De G. J. & S. 244, and cases there cited.

(*g*) *Tylden* v. *Hyde*, 2 Sim. & St. 238; *Jones* v. *Price*, 11 Sim. 557.

(*h*) *Cole* v. *Miles*, 10 Ha. 179; *Sneesby* v. *Thorne*, 1 Jur. N. S. 586; affirmed, 1058; 7 De G. M. & G. 399.

(*i*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399, 408.

be contemplated by the author of the trust, there is no sufficient indication of an intention that the trustees shall give good discharges: and the purchaser is therefore bound to see to the application of the whole or part (as the case may be) of the purchase-money.

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Where trust is for definite payments to ascertained and competent parties.

For instance, where the trust (as respects the whole or some definite portion of the purchase-money) is to pay scheduled or specified debts only (*k*), or legacies only (*l*), or legacies and scheduled or specified debts only, or to divide it between two or more adults (*m*), in all these and similar cases, as nothing seems to be contemplated which would impose upon a purchaser any greater hardship than that of paying the whole, or a definite part (as the case may be), of his purchase-money, to A. the beneficial, rather than to B. the legal, owner of the property, no intention can be implied of relieving the purchaser from his *primâ facie* obligation of seeing that his money reaches the hand substantially entitled to it.

The question is one of construction, not of convenience.

In any of the above cases, where the original incapacity of the trustees to give a good discharge is admitted, no judicial mind could, it is conceived, hold for a moment that such incapacity was removed by the mere accidental absence or incompetency of the *cestui que trust*; and this, if admitted, leads clearly to the conclusion that in the general class of cases under discussion, the question is one of construction, or intention, and not of convenience: for if convenience be the test, then the incompetency of a *cestui que trust* would always create competency in the trustee.

Subsequent events immaterial;

And it appears to be consistent with authority to say, that the power, or want of power, (as the case may be,) to

(*k*) *Lloyd* v. *Baldwin*, 1 Ves. S. 173, *Ithell* v. *Beane*, *ibid.* 215; *Binks* v. *Lord Rokeby*, 2 Madd. 227, 238; Sug. 658; see *Cotterel* v. *Hampson*, 2 Vern. 5, where the trust was to pay certain specified expenses, and invest the residue.

(*l*) *Johnson* v. *Kennett*, 3 Myl. & K. 630; *Horn* v. *Horn*, 2 Sim. & St. 448.

(*m*) 12 Sim. 546.

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give valid discharges, being dependent upon intention as evidenced in the instrument declaring the trust, is unaffected by any subsequent matter or event.

in cases where power to give receipt is expressed or implied.

This doctrine is, (it is believed,) generally admitted in cases where the intention is evidenced by an express power to give receipts (n): and, (it is submitted,) the result cannot be affected by the circumstance of the intention being evidenced by one rather than another set of expressions.

Modern authorities.

Nor are authorities wanting in support of this view: for instance, where the trusts were for payment of debts, and for other purposes also requiring a sale, the non-existence of debts at the time of sale, although disclosed to the purchaser, has been held immaterial (o): so, where the trust was to sell and pay the debts of such creditors as should execute the deed within a specified period, it was held, that, upon a sale after the expiration of that period, and although the creditors were then ascertained, the receipt of the trustees alone was a good discharge; Sir W. Grant observed, "according to the frame of the deed the purchasers were, or were not, liable to see to the application of the money; and their liability could not depend upon any subsequent event" (p).

Remarks on *Balfour* v. *Welland.*

This last decision, it is conceived, goes the full length of the rule contended for. In *Page* v. *Adam* (q), *Johnson* v. *Kennet* (r), and *Eland* v. *Eland* (s), the rule was but partially recognized; inasmuch as (they being cases upon wills) it was only decided that the existence of debts at the death of the testator was sufficient: nor did the judgment even

(n) *Keon* v. *Magawly*, 1 Dru. & W. 401.

(o) *Page* v. *Adam*, 4 Beav. 269; *Johnson* v. *Kennett*, 3 Myl. & K. 624; *Eland* v. *Eland*, 4 Myl. & C. 420; *Forbes* v. *Peacock*, 1 Ph. 717; and see Rep. note, 722; *Sabin* v. *Heap*, 27 Beav. 553; and *vide suprà*, p. 60; and see judgment of Lord St. Leonards in *Stroughill* v. *Anstey*, 1 De G. M. & G. 653, 654; Lewin on Trusts, 6th. Edit. p. 398, *et seq.* and cases there cited.

(p) *Balfour* v. *Welland*, 16 Ves. 151; 156.

(q) 4 Beav. 269.

(r) 3 Myl. & K. 624.

(s) 4 Myl. & C. 420.

in *Forbes* v. *Peacock* (*t*) go any further. In fact, in all these cases, it was sufficient, for the purpose of deciding the question before the Court, to hold that the existence of debts at the death would sustain the power. It appears, however, from the reporter's note to the last case, that Lord Lyndhurst recognized what is here contended for as the true principle; *viz.*, that the question is one of construction or intention;—a principle which has since been in terms recognized by Lord St. Leonards (*u*) and Sir James Parker (*x*)—and it is, of course, evident that in considering a will, upon a question of this nature, it must be held to speak from the date of its execution.

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Attainment of majority by infant *cestuis que trust*, immaterial, *semble.*

So, if the trust were for immediate sale, and to divide the proceeds among infants, and a sale were not to take place, until some, or even all, of the infants attained majority, it is submitted, that the power of the trustees to give receipts would not be affected: the attainment of majority by the infants would be precisely the same, in principle, as the execution of the deed by the creditors in *Balfour* v. *Welland* (*y*). Until, however, the law is more settled, it would, in such a case, be prudent to obtain, if possible, the concurrence of the adult *cestui que trust.*

Nor can subsequent events confer such a power.

And, on the other hand, if the intention to confide such a power to the trustees be not evidenced by the instrument creating the trust, subsequent events will not confer it on them: if, for instance, the trust be to sell and divide the proceeds between A. and B., and they so deal with their interests as to vest the beneficial estate in infants, or to make it the subject of contingent rights, so that a valid discharge by themselves or parties claiming under them becomes impracticable, this, it is conceived, would clearly not enlarge the powers of the trustees.

Distinction between the

But cases where, as in *Forbes* v. *Peacock* (*z*), the trustees

(*t*) 1 Ph. 717.
(*u*) See 1 De G. M. & G. 653.
(*x*) See 5 De G. & S. 329.
(*y*) 16 Ves. 151.
(*z*) 1 Ph. 717; and *vide suprà*, p. 61.

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above cases and those in which, all the purposes of the trust being satisfied, the sale is a breach of trust.

have power to sell for several purposes, and it is held to be immaterial that the purchaser has notice of the non-existence of that particular purpose, the contemplated existence of which alone indicated an intention to confer a power to give receipts, must be carefully distinguished from cases where a purchaser has notice that the *sole purpose* of the trust is satisfied. In the one case, the only question is, whether the trustees can give a good discharge for the money: and it has been held, and, (it is submitted,) properly held, that the confidence of the author of the trust is to be considered, not as varying, or temporary, but uniform and co-extensive with the duration of the trust. But, in the other case, *the trust for sale no longer exists*: so that if, in *Forbes* v. *Peacock*, the payment of debts had been the *only* object for which a sale was authorized, the purchaser, having implied notice that the debts were paid, would have also had notice that the sale itself was a breach of trust (*a*). So if, in dealing with an executor, the purchaser know that all the purposes, for the performance of which the Law empowers him to sell, have been already answered (*b*), or that he is selling not for the purposes of the trust (*c*), or that he is selling for his own private benefit, the sale will be impeachable in Equity (*d*): and a mortgagee or purchaser who has notice that the executor is dealing with the assets in part, but not altogether, for administration purposes, is bound, if the transaction come to be impeached, to show how much of the money raised was, in fact, properly raised (*e*): so, if a trustee sell to pay his own debts, or for any other unauthorized purpose, and the purchaser have notice that such is the case (*f*): but the mere fact of a beneficial devisee

Improper sale by executor to purchaser with notice confers no title.

(*a*) 1 Ph. 721; *Watkins* v. *Cheek*, 2 Sim. & St. 199; 4 Myl. & C. 427. See 1 De G. M. & G. 651.

(*b*) *Ewer* v. *Corbet*, 2 P. Wms. 148.

(*c*) *Howard* v. *Chaffer*, 9 Jur. N. S. 767.

(*d*) *Elliott* v. *Merryman*, Barn. 78, 81; 1 Wh. & T. L. C. 59; Sug. 661; Wms. on Exors. 877, *et seq.*, and cases there cited; *Chambers* v. *Howell*, 12 Jur. 905; *Miles* v. *Durnford*, 2 Sim. N. R. 234; 2 De G. M. & G. 641; *Stroughill* v. *Anstey*, 1 De G. M. & G. 648; *Haynes* v. *Forshaw*, 11 Ha. 99; *Collinson* v. *Lister*, 2 Jur. N. S. 75; 20 Beav. 356; affirmed, 7 De G. M. & G. 634.

(*e*) *Carter* v. *Sanders*, 2 Dre. 248.

(*f*) See *Eland* v. *Eland*, 4 Myl. & C. 427; and see *Rogers* v. *Rogers*, 6

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and executor, who has an estate subject to a charge of debts, selling it as his own, is no evidence of an intended breach of trust; for he is in truth the owner, subject to the charge, and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do (g): and such a devisee can make a good title to a purchaser or mortgagee without the concurrence of his co-executors; although the will contains a general, in addition to the specific, charge of debts and legacies: and he has the same power, although he be not an executor (h). And where a trustee professedly sells for payment of debts, or for any other authorized purpose, he is not bound to prove the existence of debts, or to give any information respecting them (i).

Purchaser with notice that sale is unauthorized.

Where, however, the purchaser has notice, or the circumstances are such that he must be presumed to have had notice, that the sale is being made for an unauthorized purpose, he takes the property subject to all the liabilities of the trust (k); but the fact of the devisee including in the sale or mortgage other property of his own, raises no presumption that he is dealing with the devised property for any improper purpose (l).

Voluntary conveyance by trustee to devisee.

It has, however, been held that where there is a general charge of debts and legacies, a voluntary conveyance (m) from the trustee and executor to the beneficial devisee, reciting that the debts and legacies are all paid, confers a good title (n). This decision seems to have rested on the

Sim. 364; *Braithwaite* v. *Britain*, 1 Keen, 206; *Stroughill* v. *Anstey*, 1 De G. M. & G. 654; *M'Neillie* v. *Acton*, 4 De G. M. & G. 744; *Colyer* v. *Finch*, 5 H. L. Cas. 905; *Howard* v. *Chaffer*, 9 Jur. N. S. 767; *Walker* v. *Taylor*, 8 Jur. N. S. 681.

(g) *Eland* v. *Eland*, 4 Myl. & C. 428; and see *Higgins* v. *Shaw*, 2 Dru. & W. 356; *Stroughill* v. *Anstey*, *suprà*; *Dowling* v. *Hudson*, 17 Beav. 248.

(h) *Corser* v. *Cartwright*, L. R. 8 Ch. Ap. 971.

(i) *Forbes* v. *Peacock*, 1 Phill. 717; *Mather* v. *Norton*, 21 L. J. Ch., V.-C. P.; *Sabin* v. *Heape*, 27 Beav. 553.

(k) See *Walker* v. *Taylor*, 8 Jur. N. S. 681.

(l) *Barrow* v. *Griffith*, 11 Jur. N. S. 6.

(m) But which could have operated only as a release: as he took no estate.

(n) *Storry* v. *Walsh*, 18 Beav. 559.

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unsatisfactory ground of the inconvenience of binding the purchaser from the devisee to see to the performance of an indefinite trust: such inconvenience being considered not as an element in deciding the true construction of the trust instrument, but with reference merely to circumstances as existing at the time of the sale.

Distinction between the above and cases where object of the sale is to provide for deficiency in personal estate.

Somewhat similar in principle to the distinction above referred to is that which exists between cases where the trustee is to sell, and apply the proceeds in making good a deficiency in the personal estate to answer debts and legacies, and those in which he is only authorized to sell in the event of the personal estate so proving deficient. In neither case is there any difficulty as to payment of the purchase-money to the trustee: for it cannot be presumed to have been intended that a purchaser should involve himself in the administration of the estate. And even in the second of the two cases, if there be a mere trust for sale, and a good title can, independently of its exercise, be made to the legal estate, a purchaser will, it appears, be protected from the necessity of ascertaining the existence of a deficiency, although the trust instrument do not (as it should do) contain a declaration to that effect (*o*). But if there be a *mere power* of sale, the title to the legal estate will depend upon the occurrence of the specified event (*p*): and the trustees' receipt clause will be ineffective unless it be so worded as in terms to enlarge the power (*q*).

Purchaser, when entitled to evidence of estates being sold in due rotation.

And where a testator devised estates A. and B., upon trust, if any debts remained unpaid, to sell first A., and then (if necessary) B., it was held that while estate A. remained unsold a good title could not be made to B., without clear evidence being adduced that the proceeds of A. would be insufficient for the purposes of the trust (*r*).

(*o*) Sug. 662.

(*p*) See *Dike* v. *Ricks*, Cro. Car. 335; *Culpepper* v. *Aston* or *Austin*, 2 Ch. Ca. 115, 221; Sug. 662.

(*q*) See Sug. 663. See a case of *Lord Rendlesham* v. *Meux*, 14 Sim. 249: where the opinion of the trustees was in terms made the test of the necessity for a sale.

(*r*) *Pierce* v. *Scott*, 1 Y. & C. 257.

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On death of vendor, purchase-money is payable to executor.

Where a testator himself contracted to sell the estate, the purchase-money must be paid to his executor; and the ordinary receipt clause in the will does not enable his trustees to give a discharge for it, although the estate be devised to them in trust to complete the contract (s).

Surviving trustees, when able to sell and receive purchase-money.

It has been held, that where the instrument creating the trust *directs* that any vacancy in the trust shall be filled up within a specified period, which direction is not complied with, the surviving trustees can nevertheless sell and give a good discharge for the purchase-money under the usual receipt clause (t): but this doctrine should perhaps be cautiously acted on.

Sale by continuing trustees when trust instrument provides for appointment of new trustees.

In one case, where real estate was vested in three trustees upon trusts for sale, and the trust instrument contained a power for the appointment of new trustees, and "thereupon" the property was to be conveyed to the continuing and new trustees, and upon the appointment of a new trustee no conveyance was made, the two old trustees were held competent to convey, on the purchase-money being paid to them and the new trustee (u).

Where realty was devised in trust for sale, with power for "the trustee acting in the execution of the trusts" to give receipts, and the devisee and executor disclaimed; it was held by Lord Romilly that the heir of the testator, having taken out administration with the will annexed, could sell the estate, and give a valid discharge for the purchase-money (x); but this has been in effect overruled by a later case (y), where it was properly held by Lord Westbury that where lands are devised to trustees in fee upon trusts or with powers which in their execution require the exercise of judgment and discretion,

(s) *Eaton* v. *Sanxter*, 6 Sim. 517.

(t) *Warburton* v. *Sandys*, 14 Sim. 622.

(u) *Welstead* v. *Colville*, 28 Beav. 537.

(x) *Austin* v. *Martin*, 29 Beav. 523.

(y) *Robson* v. *Flight*, 4 De G. J. & S. 608, 613.

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and the trustees disclaim the devise, so that the legal estate in fee descends to the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will. But a power to sell real estate, exercisable by the testator's "executor or administrator for the time being," may be exercised by his administrator *durante minoritate* (z).

Payment to trustees, some of whom are not duly appointed, whether valid.

It has also been held, that payment of money to three persons, nominally trustees, but only one of whom was competent to receive it, and a joint and several receipt given by the three, sufficiently discharged the purchaser (a). This also, it is conceived, is a doctrine open to observation: it is clear that the effect of such a mode of payment might often be to bring the money under the sole eventual control of persons who had no right whatever to deal with it.

Cooke v. *Crawford.*

In one case, which has been frequently questioned, but never overruled, where there was a devise of a fee simple estate to trustees, upon trust that they, or the survivors or survivor of them, or the heirs of such survivor, should sell, without mentioning the "assigns," it was held that the devisees of the surviving trustee could not give a good title to a purchaser (b); the ground of this decision being that without an express authority the trust could not be delegated.

Where the trust is that the trustee, his heirs and "assigns" shall sell.

It seems to be now settled that where the devise is upon trust that the trustees or the survivor of them, his heirs and "assigns" shall sell, the surviving trustee, though he cannot transfer the trust by act *inter vivos*, may neverthe-

(z) *Monsell* v. *Armstrong*, L. R. 14 Eq. 423.

(a) *Miller* v. *Priddon*, 18 L. J. N.S. Ch. 226, V.-C. E. affirmed, on the ground that the trustees were well appointed, 1 De G. M. & G. 335.

(b) *Cooke* v. *Crawford*, 13 Sim. 91; and see a modern case at law, *Stevens* v. *Austen*, 7 Jur. N. S. 873. See, too, comments on *Cooke* v. *Crawford*, in *Wilson* v. *Bennett*, 5 De G. & S. 475, 479; *Ashton* v. *Wood*, 3 Sm. & G. 436, 445; 3 Jur. N. S. 1164, 1167; and in *Stevens* v. *Austen*, *ubi suprà*.

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less devise it, and the devisee can make a good title (c); and it appears to be considered immaterial whether the instrument creating the trust does, or does not, contain a power to appoint new trustees. Where it does not contain such a power, no reasonable explanation of the use of the word "assigns" can be given, unless there is implied in the surviving trustee a capacity to transfer the trust by will (d). Where, however, such a power is expressly given, the use of the word "assigns" may be explained without any necessity for implying a right in the trustee to devise the trust estate, so as to confer on the devisee an authority to execute the trust; and in such a case the rule above stated is based on the assumption, that the settler must have intended to provide a permanent machinery for the execution of the trust, and must be taken to have contemplated the possible incapacity of the heir of the surviving trustee; whence arises this reasonable inference that, by confiding the trust to the trustee, his heirs and "assigns," he intended to confer upon him a discretionary power of vesting the trust in a devisee (e).

All trustees must join in receipt.

In the case of several trustees, all who have not effectually disclaimed (f) must join in the receipt (g); although any one alone can give a valid discharge at Law (h): and in one case it appears to have been intimated by an eminent judge, that, even in Equity, payment to one of several trustees upon a receipt signed by all would discharge the purchaser (i); and, in another case, the Court seems to have held that such a receipt would discharge the purchaser, although the money were in fact paid not to the trustees,

(c) See and consider *Hall* v. *May*, 3 K. & Jo. 585; *Titley* v. *Wolstenholme*, 7 Beav. 425; but see *Ashton* v. *Wood*, 3 Jur. N. S. 1164; 3 Sm. & G. 436.

(d) See *Titley* v. *Wolstenholme*, *ubi suprà*.

(e) See judgment of V.-C. Wood in *Hall* v. *May*, *ubi suprà*; and see Lewin on Trusts, 6th ed. p. 204.

(f) As to which see Hill on Trustees, 203, *et seq.*; Lewin, 392, *et seq.*

(g) See *Crewe* v. *Dickin*, 4 Ves. 97; Sug. 664.

(h) *Husband* v. *Davis*, 10 C. B. 645.

(i) See *Webb* v. *Ledsam*, 1 K. & J. 388; *Charlton* v. *Earl of Durham*, L. R. 4 Ch. Ap. 433.

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but, by their direction, to a stranger (*k*). Where the trustees have the estate and not a mere power of sale, the concurrence of a disclaiming trustee is unnecessary in Equity (*l*); even although the receipt clause specially refer to receipts by the trustees or the *survivor*, &c. (*m*): but a mere power of sale is strictly construed, and can only be exercised by the persons who are, expressly or by reference, designated as donees of the power, in the trust instrument (*n*); except where, in the case of executors, the disclaimer of some of them is remedied by statute (*o*).

(*k*) See and consider *Hope* v. *Liddell*, 21 Beav. 202, 203; but this is a principle which must be very cautiously acted on: see Lewin on Trusts, 6th ed. p. 413; *vide infrà*.

(*l*) *Crewe* v. *Dickin*, 4 Ves. 97, 100; *Nicloson* v. *Wordsworth*, 2 Sw. 375; *Hawkins* v. *Kemp*, 3 East, 410, 421, 434, 437.

(*m*) *Adams* v. *Taunton*, 5 Madd. 435. The fact of the receipt clause being so worded does not appear by the report, but it is stated in a MS. opinion of the late Mr. Duval, who caused the will to be searched for, with reference to Lord Eldon's observation on *Crewe* v. *Dickin* in 2 Sw. 371. The following remarks, taken by permission from an opinion given by Mr. Hayes are pertinent to the matters treated of in the text: "As a general rule, where the legal estate is vested in two or more as trustees for sale or other purposes, *the trust survives and devolves with the estate*, notwithstanding any loose expressions of a different tendency; which, in sound construction, ought to be rejected as informalities, or reconciled, with a due regard to the nature of the property and other circumstances. In such cases (*i.e.*, where the trust is created in respect of an estate vested in the trustees) it ought to be treated as wholly immaterial whether in point of form the trust is simply 'to sell, &c.,' or 'that they the said trustees do and shall sell, &c.,' or 'that they the said trustees or the survivor, &c.,' or 'that they the said trustees, their heirs or assigns, *or* their heirs, executors, administrators, or assigns,' &c., &c., and so as to the power to give discharges, &c. It must be confessed, however, that this plain rule has been lost sight of in some of the later cases; and that, in deciding upon the effect of such expressions, *trusts* have been confused with *powers*, to an extent which renders it very difficult to advise upon titles which involve questions of this nature. Another sound rule is that trustees have impliedly all the powers of giving discharges, &c., which are requisite to enable them to execute the trusts with effect. But this rule has also been much broken in upon by decisions which greatly embarrass its application in practice."

(*n*) See *Townsend* v. *Wilson*, 1 B. & Ald. 608; *Hall* v. *Dewes*, Jac. 189, 193; *Wilson* v. *Bennett*, 5 De G. & S. 475; *Newman* v. *Warner*, 1 Sim. N. R. 457; and cases cited, and *Brassey* v. *Chalmers*, 16 Beav. 235; reversed, 4 De G. M. & G. 528; *Lane* v. *Debenham*, 11 Ha. 188; *Hinde* v. *Poole*, 1 K. & J. 383; *Saloway* v. *Strawbridge*, 1 K. & J. 371; affirmed, 7 De G. M. & G. 594; and see *Monsell* v. *Armstrong*, L. R. 14 Eq. 423, *cited suprà*, p. 606.

(*o*) 21 Hen. VIII. c. 4, s. 1, which gives the power to the acting executors.

Where a testatrix purported to give to a tenant for life the same powers of sale and exchange as were given by her father's will to his trustees, this was held to confer no power to give receipts, although such a power was contained in the father's will (*p*).

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Reference to power of sale in prior instrument, held not to extend to power to give receipts.

When the trust-instrument contains no power to appoint new trustees, trustees duly appointed by the Court, are, if competent to sell (*q*), competent also to exercise the power of giving discharges for the purchase-money (*r*); and also to exercise any discretionary powers given to the trustees or trustee for the time being (*s*); or which, by fair construction, may be considered to be annexed to the office (*t*): and, by a modern enactment, every trustee appointed by the Court, whether before or after the passing of the Act, has the same powers, authorities, and *discretions*, and may in all respects act, as if he had been originally nominated a trustee by the instrument creating the trust (*u*).

Trustees appointed by the Court.

And we may here refer to the repealed (*v*) Act of 7 & 8 Vict. c. 76; under which, from the 1st January to the 30th September 1845, inclusive, the *bonâ fide* payment to and receipt of any person to whom any money was payable upon any express or implied trust or for any limited purpose, were an effectual discharge to the person paying the same; and to the statutes above referred to, which have re-enacted and extended these provisions (*x*).

7 & 8 Vict. c. 76.

A power for trustees to lend upon mortgage appears to carry with it a power to give sufficient discharges to the borrowers of the money (*y*).

Power to lend on mortgage implies power to give receipts:

(*p*) *Cox* v. *Cox*, 1 K. & J. 251.

(*q*) *Suprà*, n. (*m*) and (*n*).

(*r*) *Drayson* v. *Pocock*, 4 Sim. 283; *Newman* v. *Warner*, 1 Sim. N. R. 457, 461.

(*s*) *Bartley* v. *Bartley*, 3 Drew. 384.

(*t*) *Byam* v. *Byam*, 19 Beav. 58; where the discretionary power was given to "the *undersigned* trustees" of marriage articles, but was considered to be conferred upon them in their character of trustees, and not as individuals; see *ibid.* p. 66.

(*u*) 23 & 24 Vict. c. 145, s. 27.

(*v*) See 8 & 9 Vict. c. 106, s. 1.

(*x*) *Vide suprà*, p. 595.

(*y*) *Wood* v. *Harman*, 5 Madd. 368;

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so also a power to vary securities, *semble.*

So, it is conceived, a power to vary securities will, as a general rule, authorize the trustees to give valid receipts on a change of investment: but in one case, where trustees of a will, with power to vary securities, and to give valid receipts, advanced the trust fund upon mortgage, with a proviso for redemption on the re-transfer of stock, and on a sale of part of the mortgaged property received the purchase-money in cash, it was held on a subsequent sale that a good title could not be made; for the trustees were not authorized to receive money instead of stock, and there was no evidence of any intention to invest it (*z*).

Investment in breach of trust; power of trustees to sell or release.

When, as frequently happens, trust moneys have, in breach of trust, been invested upon mortgage, or in the purchase of real estate, and the trust appears upon the title, a question often arises as to the competency of the trustees to deal with the property without the concurrence of their *cestuis que trust.* In the case of a mortgage, if the entire amount advanced is cleared by the sale, no difficulty, it is conceived, can exist; as the trustees do only their duty in remedying the breach of trust and realising the fund. Even where less than the sum advanced is realised, it seems to be the opinion of some experienced equity lawyers, as well as conveyancers, that the purchaser acquires a good title. The practical inconvenience of a contrary doctrine is perhaps the strongest argument in favour of this conclusion. Where trustees had, in breach of trust, advanced the trust fund upon a third mortgage, and then joined with the mortgagor and first and second mortgagees in selling the property, but received no part of the purchase-money, which was insufficient to pay off the prior charges, opinions in favour of the title were given by eminent conveyancers. It was suggested that the power of the trustees to release might be considered to be analogous to the power of assignees in

Lock v. *Lomas*, 5 De G. & S. 326; as to a power of investment carrying with it a power of varying securities, see *Re Cooper's Trusts*, W. N. 1873, p. 87.

(*z*) *Pell* v. *De Winton*, 2 De G. & Jo. 13; *sed quære.*

bankruptcy to disclaim in a foreclosure suit; but the title was sustained mainly on the broad principle that a trustee having, whether in due execution of the trust, or in breach of trust, advanced the trust money upon a security which proves to be insufficient, is not only justified in making, but is bound to make, the best of his position (*a*); and is therefore competent by all available means to realise the security; or, if it be worthless, then by abandoning it, to avoid litigation and costs. There seems, however, to be a difficulty in holding that the *cestuis que trust*, who have a lien on the improper security (*b*), can be bound by the trustee's *opinion* as to its worthlessness. Suppose an equity of redemption were mortgaged to A. in trust for B., an infant, and the first mortgagee were to file a bill to foreclose, A. could not by his mere disclaimer bind the infant: there must, it is conceived, be an inquiry whether such disclaimer would be for the infant's benefit. The case of assignees in bankruptcy was, perhaps, hardly analogous; as to them is confided the general administration and winding up of the bankrupt's estate. Chap. XIII. Sect. 3.

In the case of an unauthorized *purchase* with trust funds, the right of the *cestuis que trust* (*c*) to elect to take the property as land instead of money, creates a serious difficulty in the way of a sale by merely the trustees: but where the whole amount originally invested is realised, a *cestui que trust* could scarcely be advised to impeach the sale; unless he had been personally competent, and had previously claimed so to elect. And it is conceived that where there are several *cestuis que trust*, the concurrence of any one of them in the sale, or the personal incompetency of any one of them to elect to take the property as land, would render the sale valid, at any rate if the sum invested were realised; for the election to continue the property in its state of unauthorized investment must be the act of all (*d*). So, in case of unauthorized purchase.

(*a*) See *Collinson* v. *Lister*, 20 Beav. 366.

(*b*) *Mant* v. *Leith*, 15 Beav. 524.

(*c*) See *Wiles* v. *Gresham*, 2 Drew. 258, 270; *Garner* v. *Moore*, 3 Drew. 277.

(*d*) See *Holloway* v. *Radcliffe*, 3 Jur. N. S. 198.

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Where a settlement contained a power to vary securities, a mere declaration that purchased realty should be considered personalty, has been held to give the trustees an implied power of sale (*e*).

Whether mortgage trustees can release without receiving purchase-money.

The competency of trustees, upon the sale of a portion only of the property comprised in their security, to release it from the mortgage debt, without receiving the purchase-money or an adequate proportion of it, is also a doubtful point; nor is it altogether clear that the question does not arise, even where the trust instrument contains the usual power to vary securities. Such a power, it may perhaps be contended, refers rather to a calling in of one mortgage and a putting out on another, &c., than to a mere *abandonment* of part of a security. Admitting that the transaction is unobjectionable, if the trustees in fact retain property, the value of and title to which are such that the Court will hold them justified had they originally accepted it as a security for the money, may not the purchaser's title depend upon this being the fact? It is sometimes urged that if the conveyance were to recite that the vendor had, to the satisfaction of the trustees, secured the money by a mortgage of another estate, this would clearly be sufficient to discharge the purchaser: admitting this to be correct, it may yet be argued that in such a case there would be no ground for presuming that the new security was in any way inferior to the old: whereas this must necessarily be so where there is a mere release of part of the land. Borrowers seldom press too ample a security upon lenders; and it is not to be supposed that the caution exercised by the trustees upon the original advance was *excessive*. An evident increase in the value of the property would, of course, furnish an exceptive case. The preponderance of professional opinion, however, so far as the author has been able to ascertain it, is in favour of the absolute competency of trustees to release under such a power; and of the right of a purchaser of part of the land to assume that they use their power properly, and to abstain

(*e*) *Tait* v. *Lathbury*, 11 Jur. N. S. 991; 35 Beav. 112.

from making inquiries if there be nothing in the transaction suggestive of fraud: but the point cannot yet be regarded as settled. So it is conceived that a trustee may release an equity of redemption which is clearly valueless, in order to avoid being made a defendant to a foreclosure suit. In the case of *Pell* v. *De Winton*, to which we have already referred (*f*), no question appears to have been raised as to the competency of trustees, with a power to vary securities, releasing part of the property from the mortgage, on being satisfied an adequate portion of their debt.

Trustees Relief Act—payment into Court under.

The difficulty arising from the inability of trustees, whether vendors or mere incumbrancers, to give discharges for the purchase-money, may generally be overcome by their receiving the money and paying it into Court under the Trustees Relief Act (*g*); or, where the fund is under £500, into a post-office savings bank, under the Acts conferring an equitable jurisdiction on County Courts (*h*).

As to application of purchase-money in payment of charges.

As respects moneys charged upon the estate by the author of the trust, there is a difference between charges the satisfaction of which by means of a sale appears to be contemplated, and those for which the estate seems intended to be a continuing security (*i*).

Distinction between cases where estate is intended to be a continuing security for legacy;

If, for instance, a legacy be charged upon the estate and made payable at a future period, (as where it is given to an infant and made payable, at twenty-one,) and there be nothing to show that the author of the trust intended the property to be sold before the arrival of the time for payment, and discharged from the legacy, no sale can in the interval be safely effected, except subject to the legacy (*k*). The same remarks apply to a life annuity charged upon the

or annuity;

(*f*) 2 De G. & Jo. 13; and *vide suprà*, p. 601; and see Lewin on Trusts, 6th edit. p. 495.

(*g*) See *Cox* v. *Cox*, 1 K. & J. 251; and see Lewin on Trusts, 6th. edit. p. 835.

(*h*) See 30 & 31 Vict. c. 142, s. 24.

(*i*) See on a similar point, *Mills* v. *Osborne*, 7 Sim. 30.

(*k*) *Dickenson* v. *Dickinson*, 3 Bro. C. C. 19.

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estate (*l*), which in fact stands on precisely the same reasoning, for a life annuity is merely a series of contingent legacies (*m*), payable at stated intervals and without interest. In all these cases the apparent intention of the charge is, that the estate shall remain a security for the money. In the case of portions for children it seems doubtful whether the estate can, except under special powers in the settlement, be discharged from any sums which have not become absolutely vested (*n*).

and those where an immediate sale seems to be contemplated.

If, on the other hand, the moneys charged be made payable at the time appointed for sale, the charge seems to be merely equivalent to a trust for payment out of the proceeds of sale: so, as we have already seen (*o*), when the charge is subject to a prior trust for payment of debts or other general purposes, a purchaser is unaffected thereby (*p*).

Residuary devise—is subject to legacies.

It may be useful here to remark that under a gift of a residue of real and personal estate in a will bequeathing legacies, such legacies are held to be charged on the real as well as on the personal estate, although real estate has been previously devised (*q*); and so also as to debts (*r*).

Where there is a mere testamentary charge of debts.

We have hitherto been considering the case of trustees, who are authorized to sell, and who, by the expressed or implied intention of the author of the trust, are competent to give a valid discharge for the purchase-money. In close connection with, or rather forming part of, our present subject is the question as to who are the parties with whom a purchaser may safely deal, where, instead of an express

(*l*) *Elliot* v. *Merryman*, Barnard, Ch. R. 82.

(*m*) See *Heath* v. *Weston*, 3 De G. M. & G. 606.

(*n*) *Sheppard* v. *Wilson*, 4 Ha. 392; *Wynter* v. *Bold*, 1 Sim. & St. 507, *et contrà Gillibrand* v. *Goold*, 5 Sim. 149, where the power was in a special form; *Leech* v. *Leech*, 2 Dru. & W. 568.

(*o*) *Supra*, p. 597.

(*p*) *Page* v. *Adam*, 4 Beav. 269.

(*q*) *Bench* v. *Biles*, 4 Madd. 187; *Francis* v. *Clemow*, K. 435; *Gallimore* v. *Gill*, 2 Sm. & G. 158; affirmed, 2 Jur. N. S. 1178; *Preston* v. *Preston*, 2 Jur. N. S. 1040; *Wheeler* v. *Howell*, 3 K. & J. 198.

(*r*) *Carter* v. *Sanders*, 2 Dre. 248.

trust for sale, there is a mere testamentary charge for the payment of debts, either with or without a devise of the estate.

Lord St. Leonards' Act. Devisees in trust subject to a charge may sell, &c., without express power.

For the future, the question has, by recent legislation, become of little practical importance. By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 14), where, by a will coming into operation after the passing of the Act, a testator charges his real estate with the payment of his debts, or any legacy or specific sum of money, and devises the estate so charged to any *trustee* or *trustees* for the whole of his interest, and does not make any express provision for the raising of such debts, legacy, or sum of money, the devisees or devisee in trust, notwithstanding any trusts actually declared by the testator, may raise the same either by absolute sale or by mortgage; and this power is, by the 15th section, extended to all persons taking the estate by survivorship, descent, or devise, or by appointment under the will, or by the Court of Chancery. By the 16th section, where the estate subject to the charge is not devised to trustees for the testator's whole interest, the *executor* or *executors* have a similar power of raising the amount of the charge by a sale or mortgage; but any sale or mortgage under the Act is to operate only on the estate and interest, whether legal or equitable, of the testator; and is not to render it unnecessary to get in any outstanding subsisting legal estate. Purchasers or mortgagees are not bound to enquire whether these powers have been properly exercised (*s*); and, as we have already seen, the *bonâ fide* payment of the purchase or mortgage money to the person to whom it is payable, upon any express or implied trust, is made a sufficient discharge (*t*).

The above statutory provisions apply only to wills coming into operation after the 13th August, 1859; so that, in other cases of a testamentary charge of debts, it is still necessary to consider the principles on which the doctrine of the implied power of sale depends.

(*s*) Sect. 17.

(*t*) Sect. 23, and *vide suprà*, p. 595.

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Charges, how created.

We may premise that such a charge is created by not only a direct expression of intention to that effect, but even a mere direction that the debts shall be paid (u); and the result is the same, although a time be fixed for their payment (x); but a direction that the debts shall be paid by *the executors* is insufficient to create the charge (y), unless the executors be also devisees of all the testator's interest in the land (z). Whether such a direction will charge the land, where the devise to the executor is only for life, appears doubtful (a); but it has no such operation where the devise is to *one* of several executors (b). In one case, where a testator directed his debts to be paid by his executrix, and gave her a life interest in his estate, with a power of mortgaging it for her maintenance and comfort, with a gift over at her death, it was held by Lord Romilly that the debts were not a charge upon the realty; and, on appeal, the point was considered so far doubtful, that the title could not be forced on a purchaser (c). In this case, the Master of the Rolls appears to have considered that the life interest of the executrix was subject to the charge.

Where a testator, after specifically bequeathing leaseholds which were not subject to any incumbrance, and after making other specific bequests, directed his trustees from the time of his death to receive and apply the whole of the rents of all his lands, &c., in payment of his debts, until the same were satisfied, it was held that the leaseholds specifically bequeathed were subject to the charge, and were liable to contribute rateably with the other portions of the estate to its satisfaction (d).

Executors can sell, when:

Where, instead of a mere charge, the testator, either in express terms or by equivalent expressions, directs the land

(u) See 2 Jarm. Wills, 557, 3rd edit.

(x) *Mirehouse* v. *Scaife*, 2 My. & C. 695; 4 My. & C. 269; see 1 Ha. 351.

(y) 2 Jarm. Wills, 564. 3rd. edit.

(z) *Ibid*, p. 566.

(a) See *Harris* v. *Watkins*, Kay, 438, 447; but see *Cook* v. *Dawson*, *infra*.

(b) *Keeling* v. *Brown*, 5 Ves. 359.

(c) *Cook* v. *Dawson*, 29 Beav. 123; 3 De G. & Jo. 127.

(d) *Harper* v. *Munday*, *Horrocks* v. *Munday*, 2 Jur. N. S. 119.

to be sold in order that the proceeds of sale may be applied in the payment of debts only, or debts and legacies, or may form a general fund with the moneys arising from the conversion of the personal estate, and no person is named to carry his wishes in this respect into effect, and the land itself is not devised upon trusts for payment or subject to a charge of debts, the executors seem to be the proper parties to sell and give receipts for the purchase-money; and they can make a good title even to the legal estate (e).

where there is a mere charge of debts.

So, where there is a mere charge of debts—either by express words of charge, or by virtue of a general direction that the debts shall be paid—and, subject thereto, the land is so limited by the will as to preclude the possibility or reasonable probability of any sale being effected except by means of a power in the executors, the executors seem to take, in Equity, an implied power to sell and give receipts: for otherwise the charge of debts would be equivalent to a direction by the testator to institute a chancery suit (f).

Mere lapse of time does not affect the authority to sell.

Nor does the lapse of a considerable time since the testator's death affect the authority of executors to sell under the power which is implied from a charge of debts. Thus, on a sale of the testator's real estate by the executors of the original executor, the title was forced on the purchaser, notwithstanding that twenty-seven years had elapsed since the death of the testator, and seven since the death of the executor; and it was also held that the vendors were not bound to satisfy the purchaser of the existence of debts which rendered a sale necessary (g). So, where the real estate was charged with payment of debts, "in case the personal estate should be insufficient," it was held that a good title could be

(e) *Bentham* v. *Wiltshire*, 4 Madd. 44; *Tylden* v. *Hyde*, 2 Sim. & St. 238; *Forbes* v. *Peacock*, 11 M. & W. 697; see and consider *Corser* v. *Cartwright*, L. R. 9 Ch. Ap. 971.

(f) *Robinson* v. *Lowater*, 5 De G. M. & G. 275.

(g) *Sabin* v. *Heape*, 27 Beav. 553; see too *Forbes* v. *Peacock*, 1 Ph. 717, where twenty-five years, and *Wrigley* v. *Sykes*, 21 Beav. 337, where thirty-three years had elapsed; and *vide suprà*, p. 60.

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made by the surviving executor without the concurrence of the beneficiaries (*h*).

Whether the implied power of sale enables the executors to pass the legal estate.

At Law, it has been held that a mere charge of debts does not give the executor power to convey the *legal* estate (*i*): and the better opinion seems to be that the implied power in the case which we are considering is merely *equitable*, and that the concurrence of the heir or devisee in the conveyance is necessary to pass the legal estate (*k*). Where the person in whom the legal estate is vested is under any disability or refuses to concur, recourse must be had to the provisions of the Trustee Acts, 1850 and 1852.

Devisees in trust, sell,—when.

If, however, the land is devised to trustees, even upon trusts not in terms connected with the payment of debts, and the will contains a general direction to sell for payment of debts, &c., or a general charge of debts, the devisees are apparently the proper parties to sell:—for the testator has constituted them the fiduciary owners of the land for the purposes of his will; and the implied trust for sale may well be read as ingrafted on the express trusts (*l*); and if, by virtue of this implied trust, they sell the estate, it would seem that they are the proper persons to receive and apply the purchase-money, and that the concurrence of the executor is not necessary (*m*).

Whether beneficial devisee, subject to charge, can sell.

But the point of greatest difficulty and importance is that which arises when a will contains a charge of debts, and a devise of the land to A. in fee beneficially:—A. not being the executor (*n*). In such cases it had been the prac-

(*h*) *Greetham* v. *Colton*, 34 Beav. 615; 11 Jur. N. S. 848.

(*i*) *Doe* v. *Hughes*, 6 Exch. 223.

(*k*) See and consider *Gosling* v. *Carter*, 1 Coll. 644; *Wrigley* v. *Sykes*, 21 Beav. 337; *Bolton* v. *Stannard*, 4 Jur. N. S. 576; *Eidsforth* v. *Armstead*, 2 Kay & Jo. 333; and see *Colyer* v. *Finch*, 5 H. L. Ca. 905; Lewin on Trusts, 6th edit., p. 408.

(*l*) See and consider *Shaw* v. *Borrer*, 1 Keen, 559; *Ball* v. *Harris*, 4 Myl. & C. 264; *Doe* v. *Hughes*, 6 Exch. 231; *Stroughill* v. *Anstey*, 1 De G. M. & G. 647; *Sabin* v. *Heape*, 27 Beav. 553; *Colyer* v. *Finch*, 5 H. L. Ca. 905; *Hodkinson* v. *Quinn*, 1 Johns. & H. 310.

(*m*) See *Hodkinson* v. *Quinn*, 1 J. & H. 310.

(*n*) See an article, 2 Jur. N. S. 68.

tice to accept titles from the devisee alone, without requiring evidence of the debts having been paid, or causing the executors to concur in the conveyance. Modern decisions, however (*o*), tended to raise a very serious question as to whether this practice had not been erroneous, and as to whether the sale should not have been by the executors, or, at any rate, with their concurrence; even the efficacy of such concurrence was doubted by many practitioners, upon the ground that the power of the executors to sell, if it existed, was a collateral power, and was incapable of being released. On the other hand, it was decided at Law (*p*), that as against the heir—and his case seemed undistinguishable from that of a devisee—the executors had no power of sale.

Remarks on the cases.

In the cases to which we have referred the beneficial devisee was either himself the executor, or the executor concurred in the sale: but in a very recent case (*q*) where there was a direction to pay debts, followed by a devise to A., one of two executors, subject to the payment of debts and legacies, it was held that A., selling as beneficial owner, could make a good title without the concurrence of his co-executor: the contention was that a purchaser could only take a title from both executors selling under the implied power; but the Court of Appeal, without laying any stress on the circumstances of A. being himself an executor, held, on the authority of *Colyer* v. *Finch* (*r*), that the doctrine of an implied power of sale in the executors has no application to a case where the estate is devised to another charged with debts; and that, in such a case, the money must be raised through the instrumentality of a sale by the devisee; who is the person, and the only person, that can make a legal title. The same reasoning which is

(*o*) *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Wrigley* v. *Sykes*, 21 Beav. 337; and see *Gosling* v. *Carter*, 1 Coll. 650; *Hodkinson* v. *Quinn*, 1 J. & H. 309; *Cook* v. *Dawson*, 29 Beav. 123; *Greetham* v. *Colton*, 34 Beav. 615.

(*p*) *Doe* v. *Hughes*, 6 Exch. 223.

(*q*) *Corser* v. *Cartwright*, L. R. 8 Ch. Ap. 971.

(*r*) 5 H. L. Ca. 922.

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applicable to the case of a *fiduciary*, seems to apply with still stronger force to the case of a *beneficial* devisee; for where no express trust intervenes, a power of sale may more readily be implied. If such a power is to be implied from a mere charge of debts, the person who takes the estate so charged seems to be the proper person to exercise it; and this, whether the estate comes to him subject only to the general charge, or is expressly devised subject to the charge of debts. Executors, as such, have nothing to do with the administration of the proceeds of real estate; a direction that debts are to be paid by *them* is, as we have seen, insufficient to create a charge upon the realty, unless they are also devisees of the estate. Why should a general charge, where they are not devisees, and are not named as the persons who are to pay the debts, give them by implication a power which is denied them when they are so named? In one case (*s*), it was assumed as clearly established, that where there is a charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell, though the persons beneficially interested are capable of concurring; but the general tendency of the later authorities (*t*) seems to warrant the former understanding of the profession, *viz.*, that the owner of the estate, whether he hold it beneficially or in trust, is the only person whose duty it is to proceed to a sale, and to apply the fund under the power given to raise the charge (*u*).

The case of *Corser* v. *Cartwright*, it is submitted, almost justifies this conclusion; still the question whether a beneficial devisee, not being himself an executor, of an estate subject to a general charge of debts, but not expressly

(*s*) *Hodkinson* v. *Quinn*, 1 J. & H. 309.

(*t*) See *Johnson* v. *Kennett*, 3 Myl. & K. 624; *Eland* v. *Eland*, 4 Myl. & Cr. 428; *Ball* v. *Harris*, 4 Myl. & Cr. 267; *Stroughill* v. *Anstey*, 1 De G. M. & G. 550; *Ogden* v. *Lawrie*, 25 L. J. Ch. 198; and *vide suprà*.

(*u*) See *Eidsforth* v. *Armistead*, 2 Kay & Jo. 333; and see Lewin, 6th edit. 408, *et seq.*, and an article 2 Jur. N. S. 68; *Corser* v. *Cartwright*, L. R. 8 Ch. Ap. 971.

charged therewith, or the executor selling under an implied power of sale, is the proper person to sell and make a good title, cannot be regarded as finally settled; and in cases not coming within the operation of the 22 & 23 Vict. c. 35 (*x*), it will still be a wise precaution for a purchaser from the devisee to satisfy himself that all the debts have been paid, or to require the executors to authorize the proposed payment of the purchase-money to the vendor. As already intimated, it is not perfectly clear that the latter plan is sufficient to perfect the title; but there are strong grounds for believing that such a title would be supported, if the case came before the Court; and that it would be held that the executor is competent to bind all parties claiming in respect of a right to have the moneys raised out of the land, which, if so raised, would have to pass through his hands for administration purposes. The point, in fact, seems to have been in effect decided by a case (*y*) already referred to; and which, even if not altogether satisfactory in itself, and although by no means universally approved of in the profession, is yet of great importance on the present question, by reason of its having been decided by the same learned judge whose decisions in *Robinson* v. *Lowater*, and *Wrigley* v. *Sykes*, have given rise to the existing difficulty. It must, however, be borne in mind, that in all cases where the legal title depends, or may eventually depend, upon the implying or not implying a legal power, the question is purely a legal one; and consequently the validity of the title will or may have to be decided in ejectment. The decisions of Courts of Law, therefore, must ultimately prevail on this question. And until it shall have been settled, by a satisfactory decision of a Court of Law, whether, under any given state of circumstances, a legal power does or does not exist, a title dependent upon the existence or non-existence of such a power will not be safe.

But statutes making real

The statutory power possessed by creditors upon taking

(*x*) Sects. 14 to 18.

(*y*) *Storry* v. *Walsh*, 18 Beav. 559; and see *Hope* v. *Liddell*, 25 L. J. Ch. 90; 21 Beav. 183; *Howard* v. *Chaffers*, 2 Dr. & Sm. 236.

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estate assets for payment do not amount to a charge of debts.

proper proceedings for that purpose of obtaining payment of their debts out of the descended or devised real estate (z) in the hands of the heir or devisee (a), does not, in the absence of an express charge of debts, bar the widow's right to dower or freebench (b); and the statutory right may be defeated by a prior alienation for valuable consideration; and in the hands of the alienee the land is discharged, although the heir or devisee remains personally liable to the extent of the value of land alienated (c): therefore, since the land itself is free, the existence of debts does not relieve a purchaser from the devisee from the necessity of seeing to the payment of legacies, &c. (d): while, on the other hand, a purchaser,

(z) Before the late Wills Act it was well settled that general pecuniary legatees had a right of marshalling as against descended real estate, so that, if the personal estate proved insufficient for the payment of debts and legacies, the legatees were entitled to come upon the descended real estate to the extent that the personal estate had been exhausted by the creditors. But there was no such right as against real estate specifically devised; and, as a residuary devise could only pass real estate of which the testator was seised at the date of his will, it was immaterial, for the purposes of this rule, whether the devise was, in form, specific or residuary. It was for a long time doubted whether since the late Wills Act a residuary devise was still in substance specific. In *Hensman* v. *Fryer*, L. R. 2 Eq. 627, V.-C. Kindersley, following his previous decision in *Dady* v. *Hartridge*, 1 Dr. & Sm. 236 (and see *Rotherham* v. *Rotherham*, 26 Beav. 465; *Bethell* v. *Green*, 34 Beav. 302), held that the effect of the 24th section, which makes a will speak as if it had been executed immediately before the testator's death, was that a devise residuary in form could no longer be treated as specific in substance. This decision, which was at variance with previous decisions by V.-C. Stuart, was reversed by Lord Chelmsford, on appeal; L. R. 3 Ch. Ap. 420; and see *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; and after some conflict of the authorities it is now well settled that a residuary devise is still specific (*Lancefield* v. *Iggulden*, L. R. 10 Ch. Ap. 136); and that the specific devisees must contribute rateably with the residuary devisee towards the deficiency of the personal estate for payment of debts; but notwithstanding Lord Chelmsford's decision in *Hensman* v. *Fryer*, the sounder opinion seems to be that general pecuniary legatees have no right of marshalling as against the devised real estate.

(a) 3 & 4 W. & M. c. 14; 47 Geo. III. c. 74, sect. 2; 3 & 4 Will. IV. c. 104.

(b) *Spyer* v. *Hyatt*, 20 Beav. 621; *Jones* v. *Jones*, 4 K. & Jo. 361; and compare *Rowland* v. *Cuthbertson*, L. R. 8 Eq. 466.

(c) *Richardson* v. *Horton*, 7 Beav. 112; *Spackman* v. *Timbrell*, 8 Sim. 253; see *Pimm* v. *Insall*, 1 Mac. & G. 449; *Kinderley* v. *Jervis*, 22 Beav. 1; see too *Hynes* v. *Redington*, 13 Ir. Ch. Rep. 206.

(d) *Horn* v. *Horn*, 2 Sim. & St. 448; *Ball* v. *Harris*, 4 Myl. & C. 264, 268.

either from the heir or devisee, is not bound to see to the payment of either specialty or simple contract debts (*e*): but he may, at the suit of creditors, be restrained by injunction from parting with the money (*f*).

Right of creditor as against equitable mortgagees of heir.

It has been held that the right of the creditor will prevail against parties claiming under the heir as equitable mortgagees by deposit (*g*); and their case seems to be undistinguishable from that of a purchaser, who has paid part of his purchase-money, but has not taken a conveyance.

Receipt under usual powers of attorney on mortgage of a fund charged on land, whether a good discharge in Equity.

It has been doubted when a sum charged upon an estate is assigned by way of mortgage, with the usual power of attorney to receive and give discharges, whether, upon the estate itself being sold, and the sum being paid off out of the proceeds of sale, the assignee can, as against incumbrancers on the equity of redemption of the sum, give a good discharge for the same in Equity under the power of attorney; especially if the deed contain a power to sell the security, and the usual clause expressly making his receipts a good discharge in Equity, in respect of the proceeds of any sale under the power (*h*); but this doubt has been removed by later authorities (*i*).

Lands Clauses Consolidation Act, 1845.

Upon a sale of superfluous lands under the Lands Clauses Consolidation Act, 1845, a receipt under the common seal of the undertaking, or under the hands of two of the directors or managers of the undertaking acting by the authority of the body, is a sufficient discharge for the purchase-money (*k*).

(*e*) Sug. 661; *Higgins* v. *Shaw*, 2 Dru. & W. 35.

(*f*) *Green* v. *Lowes*, 3 Bro. C. C. 217.

(*g*) *Carter* v. *Saunders*, 2 Drew. 248.

(*h*) *Brasier* v. *Hudson*, 9 Sim. 1.

(*i*) See *Desborough* v. *Harris*, 5 De G. M. & G. 439, 458; and see Dav. Conv. vol. ii, pt. 2, p. 598; Sugd. 665.

(*k*) See 8 Vict. c. 18, s. 131.

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(4.) *As to the amount payable in respect of purchase-money;—how ascertained, increased, or diminished.*

As to the amount payable in respect of purchase-money, how ascertained, increased, or diminished.

Purchase-money determined by arbitration.

When the contract leaves the price to be fixed by arbitration, the arbitrators (*l*) must strictly pursue the terms of their authority (*m*): if directed to choose an umpire, they must do so by an exercise of discretion, and not by lot (*n*), or chance (*o*): nor can they, nor can the umpire, previously agree to adopt, although they may be assisted by and act upon, the opinion of a third person (*p*). Misconduct in making the valuation will invalidate the award (*q*); but either party to the contract may, in Equity, bind himself by acquiescence, in a voidable award (*r*): and mere irregularity in the proceedings, *e.g.*, the election by lot of an umpire, may, even at Law, be waived by the parties or their agents authorized to act in the matter of the reference (*s*): and where the parties have left the price to be determined between them by a sole valuer, the Court, in the absence of fraud or mistake, will enforce the contract, notwithstanding that the price fixed is exorbitant (*t*). Where, however, the arbitrator has, *upon his own showing*, made a mistake, either as to the subject-matter of the reference, or as to the legal principle on the basis of which the award was to be made, the award

(*l*) The appointment of an arbitrator must be communicated to the other party within the time limited for making the appointment, *Tew* v. *Harris*, 11 Q. B. 7.

(*m*) See *Emery* v. *Wase*, 5 Ves. 846; *Milnes* v. *Gery*, 14 Ves. 400, 406; *Gourlay* v. *Duke of Somerset*, 19 Ves. see 432.

(*n*) *In re Hodson and Drewry*, 7 Dowl. P. C. 569; *Backhouse* v. *Taylor*, 2 Pr. R. 75.

(*o*) See *In re Greenwood and Titterington*, 9 Ad. & E. 671, 699.

(*p*) *Emery* v. *Wase*, 5 Ves. 848; *Hopcraft* v. *Hickman*, 2 Sim. & St. 130; *Anderson* v. *Wallace*, 3 Cl. & F. 26.

(*q*) *In re Hawley*, 2 De G. & S. 33, affirmed p. 48.

(*r*) *Blundell* v. *Brettargh*, 17 Ves. see 241; *In re Elliott*, 2 De G. & S. 17; *Ex parte Harrison*, 13 Jur. 381, V.-C. E.

(*s*) *Backhouse* v. *Taylor*, 2 Pr. R. 70, and see p. 222, *suprà*.

(*t*) *Collier* v. *Mason*, 25 Beav. 200; and see *Fuller* v. *Fenwick*, 3. C. B. 705; *Hodgkinson* v. *Fernie*, 27 L. J. C. P. 66. As to invalidating an award on the ground that the arbitrator has not used his own judgment, see *Eads* v. *Williams*, 4 De G. M. & G. 674.

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may either be set aside, or referred back to him (u); and his own evidence is admissible in explanation of the award (x). Where the award or valuation is made by two arbitrators, it should be signed by them both at the same time and place (y).

Under Lands Clauses Consolidation Act.

The 9th section of the Lands Clauses Consolidation Act (z) provides that, in the case of a party under disability or incapacity, the purchase or compensation money payable to him shall not, except where the same shall have been determined by the verdict of a jury or by arbitration, or by the valuation of a surveyor appointed by two justices under the Act, be less than shall be determined by two able practical surveyors, one nominated by the promoters, and the other by the party under disability, or incapacity; with provision for the appointment of a third surveyor, in case the two originally named fail to agree. The requirements of this section must be strictly complied with; in one case, where a railway company agreed with a charitable corporation for the purchase of part of their lands, but there was no regular nomination of surveyors, nor any certificate from them as to the adequacy of the price, the Lords Justices held, affirming the decision of the Master of the Rolls, that there was no complete contract capable of being enforced in Equity (a).

How umpire is to be appointed.

In cases of arbitration under this Act, the umpire (b) may under sect. 31 be appointed by the arbitrators (c), after the expiration of the time within which they are themselves

(u) *In re Dare Valley R. Co.*, L. R. 4 Ch. Ap. 454; affirming V.-C. G., L. R. 6 Eq. 429.

(x) *Ibid.*

(y) *Wade* v. *Dowling*, 4 E. & B. 44; and see *Eads* v. *Williams*, 4 De G. M. & G. 674, 684, 688.

(z) 8 & 9 Vict. c. 18.

(a) *Wycombe R. Co.* v. *Donnington Hospital*, L. R. 1 Ch. Ap. 268.

(b) The umpire's declaration under s. 33, need not be taken, &c., before a justice of the particular locality in which the lands are situate; *Re Davis and South Staffordshire R. Co.*, 16 Jur. 1133, Q. B.; 2 Pr. R. 599.

(c) See as to the appointment by one party, of an arbitrator to act for both parties, *Bradley* v. *London and North-Western R. Co.*, 1 Pr. R. 597; 5 Exch. 769. An arbitrator ought not to be in the personal interest of the party appointing him; see *In re Elliot*, 2 De G. & S. 17. Time for application to set aside award not extended, because of illness of party; see *Guadiano* v. *Brown*, 2 Jur. N. S. 358. As to appointment of a surveyor under the 85th section, see now 30 & 31 Vict. c. 127, s. 36.

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competent to make an award (*d*): if they cannot agree upon an umpire, and the time allowed to the Board of Trade (*e*) for appointing one has expired, the landowner is entitled to an assessment by jury, and may enforce his right by mandamus (*f*). The umpire, if appointed, may make his award at any time within three months after the duty devolves upon him (*g*): it need not assess different sums for the price of land and for damage by severance (*h*); but it must not determine the one point, and leave the other undecided (*i*): nor can it be set aside on the ground of its being contrary to evidence (*k*): although this relief has been afforded, chiefly on the ground of an omission to allow one of the parties an opportunity of producing further evidence (*l*). The company are bound at their own expense to take up the award, and furnish a copy to the landowner (*m*). Where, land having been taken under the 68th section, the landowner gives notice of his claim, exceeding 50*l*., and of his desire to have compensation assessed by a jury, he is not entitled to a notice from the company of their intention to issue a warrant to summon a jury (*n*).

(*d*) *In re Bradshaw*, 12 Q. B. 562; 5 Rail. Ca. 432.

(*e*) See sects. 28 and 23 of Act.

(*f*) *In re South Yorkshire, &c. R. Co.*, 18 L. J. Q. B. 333; 14 Jur. 1093.

(*g*) *In re Bradshaw, ubi suprà; Skerratt* v. *North Staffordshire R. Co.*, 2 Ph. 476.

(*h*) *In re Bradshaw, ubi suprà;* so in cases where the amount is assessed by a jury; see *Corrigall* v. *London and Blackwall R. Co.*, 5 Man. & G. 219; and *In re London and Greenwich R. Co.*, 2 Ad. & E. 678; *Cobb* v. *Mid Wales R. Co.*, L. R. 1 Q. B. 342. See as to an omission to specify the interests of the claimants in the land, *In re North Staffordshire R. Co., Ex parte Landor*, 2 Exch. 255; 6 Rail. Ca. 17. And see, as to other cases of doubtful or bad awards under the Act, *Wilts, Somerset, &c. R. Co.* v. *Fooks*, 3 Exch. 728; *Lindsay* v. *Direct London, &c. R. Co.*, 1 Pr. R. 529; *Bradley* v. *London and North-Western R. Co., ib.* 597; 5 Exch. 769; *In re North Staffordshire R. Co., Ex parte Wood*, 6 Rail. Ca. 25; and see *In re Dare Valley R. Co.*, L. R. 6 Eq. 429; L. R. 4 Ch. Ap. 554, (where the arbitrator admitted his mistake,) and cases there cited.

(*i*) *Wakefield* v. *Llanelly R. Co.*, 3 De G. J. & S. 11; 34 Beav. 245; and as to the finality of an award where one of the points referred is not specifically disposed of, see *Jewell* v. *Christie*, L. R. 2 C. P. 296.

(*k*) *In re Bradshaw, ubi suprà.*

(*l*) *In re Hawley*, 2 De G. & S. 33, 48.

(*m*) *Railstone* v. *York, &c. R. Co.*, 15 Q. B. 404; and see *Burnard* v. *Wainwright*, 19 L. J. 423, Q. B.

(*n*) *Reg.* v. *South Devon R. Co.*, 15 Jur. 464, Q. B.; 20 L. J. 145.

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Increase or diminution of purchase-money.

The amount originally fixed or subsequently ascertained to be *primâ facie* payable in respect of the purchase-money may in the several ways hereinafter noticed be increased or diminished.

Increased by interest;—rate of, if no agreement.

The most ordinary mode of increase is by the accrual of interest: as respects which, it will be convenient to consider, first, those cases where there is no special agreement as to interest; premising that, in such cases, interest, when payable, is payable at Law after such rate, not exceeding *5l. per cent.*, as may be allowed by the jury (*o*); and in Equity (as a general rule) after the rate of *4l. per cent.* (*p*) *per annum*.

Payable from time fixed for completion, if delay rests with purchaser.

If, then, a time be fixed for completion of the contract, and there be delay attributable to the purchaser, he must from that time pay interest upon his purchase-money, although it has been lying idle and appropriated to the purchase (*q*), and although he has not had possession of the estate, which (as in the case of a house bought for a residence) has therefore been unproductive; but he will be entitled to any actual profits arising from it (*r*).

From what time payable if delay rests with vendor.

If, on the other hand, (a time being fixed for completion,) there be delay attributable to the vendor, the purchaser, if he has been in actual possession, or in receipt of the rents and profits, of the estate, must pay interest, unless and until his money has been appropriated to the purchase and lying idle, and notice of such being the case has been given

(*o*) 3 & 4 Will. IV. c. 42, s. 28; see 17 & 18 Vict. c. 90, s. 3. As to whether compound interest can be claimed, see *Attwood* v. *Taylor*, 1 Mann. & G. 279, 332; *Stratton* v. *Symon*, 2 Mo. P. C. 125.

(*p*) Sug. 643; *Calcraft* v. *Roebuck*, 1 Ves. jun. 221. In Ireland, on a sale by the Court, only *3l. 10s., per cent.* has been charged; *Hutchinson* v. *Cathcart*, 1 J. & C. 260, 268.

(*q*) *Calcraft* v. *Roebuck*, 1 Ves. jun. 221; *Enraght* v. *Fitzgerald*, 2 Ir. Eq. 87; Sug. 628. See *Hyde* v. *Price*, 8 Sim. 593; *Att.-Gen.* v. *Corp. of Ludlow*, 1 Hall & T. 218. If the agreement fix the rate, any subsequent agreement for reduction will be construed strictly against the purchaser. *Attwood* v. *Taylor*, 1 Mann. & G. 279; and see *Minchin* v. *Nance*, 4 Beav. 332.

(*r*) *Suprà*, p. 247.

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to the vendor (s); and, in one case, where, after notice of appropriation given to the vendor, the purchase-money had, through his default, lain idle, he was disallowed interest on the purchase-money, though held accountable for the rents (t): but it appears that, (if out of possession,) he will be charged with interest only from the time when he might prudently have taken possession: *i.e.*, when a good title was shown (u) and verified (x): and although he may, if he please, in the interim, pay interest and take the rents and profits from the time fixed for completion, he is not bound to do so, where the interest exceeds the rents and profits (y). The vendor may, like a mortgagee, be made to account for not only what he actually has, but for what he might, without wilful default, have received (z); but such a direction is not of course, but must be founded on a special case made against him (a).

Whether until ... hown, ...r may appropriate ...oney and claim exemption from interest.

And, on the other hand, it has been held that a purchaser, if out of possession, is not justified in laying aside his purchase-money, and rendering it wholly or in part unproductive, until the time when a good title is shown by the vendor; and that if he do so, it will be at his own risk and loss (b). This doctrine, however, seems open to observation (c); and is opposed by a later decision (d), in which the rule as above stated was treated as well settled.

(s) *Powell* v. *Martyr*, 8 Ves. 146; *Roberts* v. *Massey*, 13 Ves. 561; *Howland* v. *Norris*, 1 Cox, 59, 62; Sug. 628.

(t) *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; and see *Vickers* v. *Hand*, 26 Beav. 630.

(u) *Forteblow* v. *Shirley*, 2 Sw. 223, cited; *Binks* v. *Lord Rokeby*, 2 Sw. 222; *Jones* v. *Mudd*, 4 Russ. 118; *Monk* v. *Huskisson*, 4 Russ. 121. And see *Carrodus* v. *Sharp*, 20 Beav. 56.

(x) *Parr* v. *Lovegrove*, 4 Drew. 170.

(y) *Esdaile* v. *Stephenson*, 1 Sim. & St. 123; *Jones* v. *Mudd*, 4 Russ. 118, 123; see *Paton* v. *Rogers*, 6 Madd. 257; *Collard* v. *Roe*, 4 De G. & Jo. 525.

(z) *Acland* v. *Gaisford*, 2 Madd. 28; *Wilson* v. *Clapham*, 1 Jac. & W. 37; see *Crosse* v. *Duke of Beaufort*, 5 De G. & S. 7.

(a) *Sherwin* v. *Shakspeare*, 5 De G. M. & G. 517; but see and consider *Phillips* v. *Sylvester*, L. R. 8 Ch. Ap. 173, where the doctrine of a vendor's liability seems to be too broadly stated; and *vide infrà*, as to his liability for deteriorations of the estate while he remains in possession.

(b) *De Visme* v. *De Visme*, 13 Jur. 1037; 1 Mac. & G. 336, stated, *infrà*, p. 638.

(c) *Vide infrà*, p. 639.

(d) *Dyson* v. *Hornby*, 4 De G. & S. 481.

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Interest payable by purchaser in possession notwithstanding ambiguity in contract.

And the cases seem to show, that when a purchaser is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion, even although the vendor delay to show a good title, and the contract do not in terms make the purchase-money payable until a good title is shown. For instance, where parties already in possession agreed to purchase land, the purchase-money to be paid on the 25th of March next "on a good and valid title being made and executed," and a title was not made until many years afterwards, but they continued in possession, and did not appropriate the purchase-money, they were held liable to pay interest from the above date (*e*). So, in a recent case (*f*), where a railway company took possession of land under their statutory powers before the value was ascertained, the vendor was held entitled to interest on the purchase-money from the time when the company took possession.

Claim not confined by statute to six years' arrears.

And, inasmuch as, until a title is shown, there is no right to either principal or interest, arrears of interest, not for six years only, but for an indefinite period, may be recovered when a title is shown: the case in the interval not being within the Statute of Limitations (*g*).

Agreement giving purchaser rents and interest.

And a special agreement purporting to give the purchaser both the rents and interest, will be narrowly scrutinized by a Court of Equity (*h*).

If no time fixed for completion, interest is payable from possession taken or title shown.

If no time be fixed for completion, the purchaser pays interest upon his purchase-money, unless lying idle with notice of the fact to the vendor, from (it is conceived) the date of the contract, if the purchaser be then in possession,

(*e*) *Att.-Gen.* v. *Christ Church*, 13 Sim. 214: *Powell* v. *Martyr*, 8 Ves. 149; *Fludyer* v. *Cocker*, 12 Ves. 25; *Birch* v. *Joy*, 3 H. L. Ca. 565.

(*f*) *Rhys* v. *Dare Valley R. Co.*, L. R. 19 Eq. 93.

(*g*) *Toft* v. *Stephenson*, 5 De G. M. & G. 735; nor does the Limitation Act of 1874 (37 & 38 Vict. c. 57) contain any provision applicable to the case.

(*h*) *Birch* v. *Joy*, 3 H. L. C. 565.

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&c. (*i*): or, if he be not then in possession, from the time of his taking possession (*k*); or from the time at which he might prudently have taken possession (*l*),—supposing it to have been offered to him;—*i.e.*, the time when a good title was shown.

Right to, how affected by production or non-production of evidence.

And a vendor's claim to interest from the time when a good title was actually shown, may be enforced, notwithstanding his having subsequently and unnecessarily adduced further evidence upon which the purchaser accepted the title (*m*). And the non-production of material evidence will not negative the vendor's claim to interest, if it has been occasioned by the purchasers having taken and insisted on an untenable objection to the title, and has not in itself been a point in dispute (*n*).

Payment cannot be evaded by giving up possession.

And a purchaser taking possession subsequently to the contract, cannot, by giving up possession, escape his liability even to subsequent interest (*o*).

Wasting of particular estate on sale of reversion equivalent to possession.

Upon the purchase of a reversion, the mere wasting of the particular estate by lapse of time appears to be (for the purpose of the above rules,) equivalent to possession by the purchaser (*p*); and where an estate which has been long

(*i*) *Ex parte Manning*, 2 P. Wms. 410.

(*k*) *Fludyer* v. *Cocker*, and *Att.-Gen.* v. *Christ Church*, *ubi suprà*.

(*l*) 2 Sw. 226; and see *Portman* v. *Mill*, 3 Jur. 356.

(*m*) *Litchfield* v. *Brown*, 23 L. J. 176, V.-C. W.

(*n*) *Monro* v. *Taylor*, 3 Mac. & G. 713.

(*o*) See note (*l*).

(*p*) *Ex parte Manning*, *ubi suprà*; *Owen* v. *Davies*, 1 Ves. 82; *Child* v. *Lord Abingdon*, 1 Ves. jun. 94; *Dary* v. *Barber*, 2 Atk. 490; *Trefusis* v. *Lord Clinton*, 2 Sim. 359; *Vesey* v. *Elwood*, 3 Dru. & W. 82; Sug. pp. 631, *et seq.*; *Hutchinson* v. *Cathcart*, 1 Jo. & C. 260, where there was a small present profit arising from the property; and see *Champernowne* v. *Brooke*, 3 Cl. & Fin. 4; and *Brooke* v. *Champernowne*, 4 Cl. & Fin. 589; where the vendor's *primâ facie* right to interest was excluded by the terms of the contract; and *Lewis* v. *Tucker*, 5 Jur. 1105; *Wallis* v. *Sarel*, 5 De G. & S. 429; *Bailey* v. *Collett*, 18 Beav. 179; but see also *Enraght* v. *Fitzgerald*, 2 Dru. & W. 43, where interest seems to have been allowed only from the time when a good title could have been made; and see *Blount* v. *Blount*, 3 Atk. 636; *Growcock* v. *Smith*, 3 Anst. 877. *Weddell* v. *Nixon*, 17 Beav. 160, seems to have been decided on the special wording of the contract, see p. 170.

let for a term, which has some years to run, at a rent originally representing its agricultural value, is sold as building land, subject to the term, the purchase may be considered as the buying of a reversion, within the stringency of the rule (q).

In a modern case, where delay had occurred in making out the title upon a sale by the Court of an estate subject to a lease for a life at a low rent, it was contended and acquiesced in, and subsequently arranged, that the purchaser, paying interest during the delay, should be allowed by way of compensation the difference between such interest and the sum of the rents received, and the increase in value of the reversion by the wearing out of the life, such increase being ascertained by an actuary; so that he was in effect, charged with, in lieu of interest, merely his actual receipts and the estimated improvement of the reversion; and this seems correct (r).

Mortgagee—interest set off on purchase by.

Upon a purchase by a mortgagee, the Court after the lapse of several years held that, in the absence of any express agreement, interest upon his mortgage debt must be set off against the interest of a corresponding portion of the purchase-money, from the time of his taking possession (s).

Interest upon valuation of timber, from what date payable. Growing timber.

Interest upon the purchase-money of timber taken at a valuation is payable only from the date of the actual valuation (t). This, however, it is conceived, can only apply to growing timber; the reason for the rule being, that its augmented value by growth is included in the valuation, and is an equivalent to interest: upon which Lord St. Leonards has remarked, "but this, which was a good reason during the war, will not, in all times, justify the withholding of

(q) *Williams* v. *Glenton*, L. R. 1 Ch. Ap. 200; affirming S. C. 34 Beav. 528.

(r) *Morris* v. *Wood*, 15 Nov. 1850, M. S.

(s) *Wallis* v. *Bastard*, 4 De G. M. & G. 251.

(t) See *Waldron* v. *Forester*, cited Sug. 631.

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interest: many cases have occurred, in which the augmented value by growth, between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period." This remark, however, is omitted from the last edition of his lordship's work, and it seems to be scarcely pertinent to the principle upon which the rule may be supported with respect to young growing timber; *viz.*, that there is an increase (not in the market price, but) in the actual quantity or quality of the subject-matter of the contract. The case, in effect, is this: the vendor agrees to sell the timber as existing at the time of contract, *plus* its future increase up to the date of the valuation, upon being paid the then estimated value of such timber and increase. He takes the chance of a rise or fall in the market value of timber as a commodity: and a fall can, it is submitted, no more justify him in requiring interest prior to the valuation, (*i.e.*, in effect an increase of purchase-money,) than an unexpected rise would warrant the purchaser in claiming a reduction of the purchase-money, upon the ground of its being of larger amount than he had anticipated.

Principle which should determine the liability.

Timber arrived at maturity.

Nor does it appear that, in the case of timber which has arrived at maturity, interest ought, as a general rule, to be paid prior to the actual valuation; for there has been no increase, nor any advantage to the purchaser: the case might, however, probably be different, if he had been the cause of, or consenting to, the delay in the valuation; or if, the chief value of the timber consisting in its ornamental character, he had been in possession of the estate.

In all the above cases it must be assumed that the valuation has been delayed beyond the date at which it ought to have been made: *i.e.*, the time, if any, specified in the contract, or, if no such time be specified, then the time fixed for completion. Any claim to interest, or abatement in respect of the intermediate period, whether the timber be growing or decaying, may be negatived by the argument

that the parties having elected upon the act of valuation for fixing the time at which the price is to be determined, must be deemed to have weighed all the consequences which would render the price, fixed at that time and in that manner, a fair equivalent for the transfer. If a vendor agreed to convey forthwith, in consideration of 1,000*l.* to be paid at the expiration of two years, it could scarcely be contended that he would be entitled to interest in the mean time. If no time were originally fixed either for valuation or for completion, the time for valuation might it is conceived be fixed by notice from either party requiring it to be made immediately.

Interest upon valuation of fixtures—occupation rent in respect of;

The case of fixtures, agreed to be taken at a valuation, seems to be the converse of that of growing timber; they being a *deteriorating* property. Where they are of large value, the purchaser, if let into possession after the time at which the valuation ought to be, but before it is actually made, should, it is conceived, pay an occupation rent for the intermediate period: the case seems to be conversely within the principle of *Dyer* v. *Hargrave* (*u*), where it was decided that when, upon the sale of leaseholds, the vendor retains possession after the time fixed for completion, he must pay an occupation rent to the purchaser, and receive interest upon the purchase-money.

and of leaseholds.

Where price payable by instalments.

Where the price is payable by instalments, and nothing is said as to possession, it would appear that the purchaser is entitled to possession only from the time of paying the *last* instalment (*x*).

The general rule is subject to variation.

The rule, however, that a vendor retaining possession after the time fixed for completion must pay an occupation rent to the purchaser is not an invariable one. Thus, where on a sale to a railway company the delay in completion was solely attributable to the purchasers, and, under the

(*u*) 10 Ves. 510; and see *Cheetham* v. *Sturtevant*, 3 De G. & S. 468.

(*x*) *Kenney* v. *Wexham*, 6 Madd. 335, a case of an annuity.

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pressure arising from their default, the vendor continued to occupy the premises for his business, which he carried on for his own benefit, the company were held liable to pay interest upon the purchase-money as from the date fixed for completion, without being entitled to any allowance for occupation rent (y).

Vendors retaining possession of trade premises yet not held liable to occupation rent.

So where, upon a sale of the lease of a public house, and the stock in trade, the purchaser wrongfully refused to perform the contract, and the vendors retained possession and carried on the business, the purchaser was compelled to pay interest on his purchase-money, and also all sums which the vendors had laid out for the rent, taxes, and other necessary outgoings, with interest; and was not allowed to charge the vendors with an occupation rent (z). It may be observed of this case, that the vendors could not have discontinued the business without incurring the risk of the property being seriously depreciated while the completion of the contract yet remained uncertain: but it was, nevertheless, held on appeal, that they carried it on at their own risk, (and, it is presumed, for their own benefit,) subject to their liability to account to the purchaser for so much of the stock included in the contract as they had actually disposed of.

What a sufficient appropriation of purchase-money to relieve purchaser from interest.

The cases do not seem to define satisfactorily what is a sufficient appropriation of money by the purchaser to relieve him from the liability to interest. In *Winter* v. *Blades* (a), the purchaser, upon entering into the contract, paid into his general account at his banker's a sum less than the purchase-money, but which, together with his existing balance, exceeded the purchase-money: and until completion his balance was never less than the purchase-money, except for a period of three days; and the Court discharged him from payment

(y) *Leggott* v. *Metrop. R. Co.*, L. R. 5 Ch. Ap. 716; but the vendor had to pay the outgoings during his occupancy.

(z) *Dakin* v. *Cope*, 2 Russ. 176.

(a) 2 Sim. & St. 393; and see *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56; where the money was transferred to a separate account.

of interest, in respect of the difference between his average balance for the period between the date of his notice to the vendor and completion, and his average balance for three years immediately preceding the contract: thus establishing (apparently,) two principles; *viz.*, first, that appropriation of a *part* of the purchase-money, coupled with the fact of the residue being immediately appropriable, relieves the purchaser from payment of interest *pro tanto*; and secondly, that payment into his general banking account is an appropriation: the latter (if not the former) of which seems to be disapproved of by Lord St. Leonards (*b*); and both appear to be questionable.

Actual *bonâ fide* appropriation requisite.

Lord St. Leonards observes, "If the money was not actually and *bonâ fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any way made use of it, the Court would compel him to pay interest." If, therefore, the purchaser pay the money into a bank at which he has an account, it is at least prudent to make the payment to a separate account. In many of the joint-stock banks interest, at a rate somewhat lower than the ordinary rate, is allowed upon sums deposited; and it is conceived, that, in such a case, if the money were payable at call or upon short notice, the purchaser upon giving the usual notice to the vendor would escape liability in respect of the difference of interest.

Payment into bank at call.

Purchaser acceding to delay cannot afterwards appropriate purchase-money.

When it appears that some considerable time must elapse before the title can be perfected, and the purchaser agrees to take possession and pay interest, he cannot, (unless there be great and unexpected delay,) by subsequently appropriating the purchase-money and giving notice, escape his liability to interest (*c*); but in one case (*d*), where, subsequently to the purchaser being let into possession, a difficulty arose in completing the title, and the purchaser paid,

(*b*) Sug. 628; and see *Macdonnell* v. *Harding*, 7 Sim. 178; and see *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56.

(*c*) *Dickinson* v. *Heron*, Sug. 630, n.

(*d*) *Kershaw* v. *Kershaw*, L. R. 9 Eq. 56.

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to a separate account at his bankers, a sum, as he thought, sufficient, but which was not quite sufficient to answer his purchase-money, and gave notice of the payment to the vendors, who merely objected to the form of the notice; the appropriation was treated as valid *pro tanto*, and as relieving the purchaser from liability to interest. In the case just referred to, the purchaser seems to have been entitled to take possession under the contract, before payment of the purchase-money.

Rule where the condition provides for payment of interest.

In *Esdaile* v. *Stephenson* (e), Sir John Leach laid it down that where there is an express stipulation as to the payment of interest by the purchaser it applies to every delay, however occasioned; unless, of course, the delay is owing to the gross misconduct or wilful delay of the vendor; and after some fluctuation of the authorities, to which we will shortly refer, this rule is now well established. In two subsequent cases, where the agreement was to pay interest during delay caused "by any unforeseen or unavoidable obstacles" (*f*), or "by any unavoidable obstacle" (*g*), it was held that the stipulation did not apply to delays in making out the title. Where, however, the agreement was to pay interest during delay arising "from any cause whatever except the wilful (*h*) default of the vendor" (*i*), or, simply, "from any cause whatever" (*k*), (an expression not so strong against the purchaser as the former one, inasmuch as the particular exception of "wilful default" increased the stringency of the first part of the sentence,) it was held, that interest was payable during delays occasioned by the state of the title; but, in the latter case (*l*), the order was made without prejudice to

(*e*) 1 Sim. & Stu. 122; and see *Jones* v. *Mudd*, 4 Russ. 118; *Matson* v. *Swift*, 5 Jur. 645, R.

(*f*) *Monk* v. *Huskisson*, 4 Russ. 121, n., which cannot be reconciled with Sir J. Leach's previous decision in *Esdaile* v. *Stephenson*.

(*g*) *Birch* v. *Podmore*, Sug. 635.

(*h*) As to what is wilful default, see *Elliott* v. *Turner*, 13 Sim. 477; *Ex parte Bradshaw*, 16 Sim. 174; *In re the Windsor, Staines, and South Western R. Act*, 12 Beav. 522; *Gregory* v. *Wilson*, 9 Ha. 689, *infra*, s. 10.

(*i*) *Oxenden* v. *Lord Falmouth*, Sug. 637.

(*k*) *Greenwood* v. *Churchill*, 8 Beav. 413.

(*l*) *S. C.*

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any application by the purchaser for compensation; and a different decision was come to, when the expresssion was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest" (*m*); and, of course, a condition containing the words "any cause whatever," even without anything to qualify their effect, would not authorize wilful delay on the part of the vendor (*n*). In a later case, where the expression, upon a sale by the Court, was, "if the purchaser shall fail in making such payments at the time and in manner aforesaid, then, and in such case, from whatever cause the delay may have arisen," interest to be paid at 5*l*. *per cent.*, and no abstract was delivered until after the time fixed for completion, and the supplemental abstracts, showing a good title, were not delivered, although repeatedly applied for, until eighteen months after the time fixed for completion, and the purchaser at the commencement of the delay paid the purchase-money into a bank, at a low rate of interest, and gave notice thereof to the vendors, and that he should require compensation, and then, upon the title being cleared up, obtained an order for a conveyance and for payment of his purchase-money into Court, without prejudice to his right (if any) to compensation, and the purchase was accordingly completed, a petition for compensation in respect of the loss of interest was dismissed by Sir J. Wigram, V.-C., with costs, upon the ground of the purchaser having completed the contract: but it seems to have been admitted that while the contract remained incomplete, he might have obtained relief, or might probably have abandoned the contract (*o*): and the decision of the V.-C. was reversed by Lord Cottenham on appeal: his Lordship holding, either that interest did not begin to run until the delivery of an abstract showing a good title; or that, if the condition bound the purchaser to pay interim interest, he was entitled

"Purchaser making default."

"Purchaser failing in making payment."

De Visme v. *De Visme.*

(*m*) *Denning* v. *Henderson*, 1 De G. & S. 689; and see, at Law, *Perry* v. *Smith*, 1 Car. & M. 554; stated *suprà*, p. 128.

(*n*) See *Paton* v. *Rogers*, 6 Madd. 256.

(*o*) *De Visme* v. *De Visme*, 13 Jur. 205.

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to compensation for the non-performance by the vendor of his part of the contract (*p*).

But, in the same case, it having been decided that the right to interest on the one hand, and to the income of the estate on the other, was not to commence until a good title was abstracted, the purchaser, when he applied for it, was refused compensation in respect of his money having been comparatively unproductive in the interim (it having, as before stated, been paid into a bank at a low rate of interest upon notice to the vendors). His Lordship held that such a claim could not be sustained: that the vendors being in default, the delay having been occasioned by their not performing their part of the contract, were not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract: but they were not, therefore, to make compensation for any loss not arising out of their contract; such default on their part not making it, in his Lordship's opinion, necessary or proper for the purchaser to lay his money by and make it unproductive, for the purpose of throwing the loss of that unproductiveness on the vendors: and that it was carrying the principle out strictly, to postpone the time for paying the purchase-money till the time a good title was shown (*q*).

Remarks on *De Visme* v. *De Visme*.

This decision was generally disapproved of, and seems to be open to criticism. It may be admitted that when a purchaser has agreed to pay interest and take the profits from a specified day, notwithstanding delay arising from any cause whatever, there would be much hardship (at least in cases where personal possession of the property is essential to its due enjoyment) in holding this agreement to extend to a delay in showing such a title as would justify a prudent purchaser in accepting possession, and so receiving the

(*p*) *S. C.* on appeal, 1 Mac. & G. 336; and see *Robertson* v. *Skelton*, 12 Beav. 363. In *Morris* v. *Wood*, *suprà*, p. 631, Lord Cranworth stated that he adopted the latter of Lord Cottenham's two alternatives.

(*q*) 1 Mac. & G. 353.

equivalent for his interest. But if, on the ground of hardship, the strict words of the agreement (which are sufficiently large in terms, and are notoriously intended in practice, to extend to delays in making out the title) may be disregarded, surely, on the like principle, the purchaser (who may possibly have called in money upon the faith of the vendor's agreement to complete on a certain day) ought to be allowed to appropriate and re-invest it in such a manner as that it may produce some income and yet be ready when required, and to throw the loss of interest on the vendor (r).' In the particular case, the purchaser, although he had the satisfaction of establishing a principle, seems practically to have been left in no better position than that in which he was placed by the decision of the Vice-Chancellor.

Recent decisions.

Later decisions have brought the doctrine back into much the same state as that in which it was before *De Visme* v. *De Visme*, *viz.*, that where there is neither vexatious conduct, dealing in bad faith, nor gross negligence (s) on the part of the vendor, the special condition containing the expression "from any cause whatever," will extend to delays fairly arising from the state of the title (t). Thus, where a vendor died on the eve of completion, having devised the estate to an infant, which rendered a suit necessary, the purchaser was held liable to pay interest from the time originally fixed for completion (u): so, also, where, after the contract, a suit was found to be necessary in order to clear the title (x): and, in a late case, where there was a contract for the purchase of an undivided moiety of an estate subject to a lease, and, in consequence of the owner of the other moiety claiming the entirety, and refusing to produce the deeds, the vendor was compelled to

(r) See *Dyson* v. *Hornby*, 4 De G. & S. 481; where, however, there was no special condition.

(s) See 18 Jurist, 845.

(t) See *Sherwin* v. *Shakspeare*, 5 De G. M. & G. 517; 17 Beav. 267.

(u) *Bannerman* v. *Clarke*, 3 Drew. 632; and see *Tewart* v. *Lawson*, 3 Sma. & Gif. 307; *Vickers* v. *Hand*, 26 Beav. 630.

(x) *Lord Palmerston* v. *Turner*, 33 Beav. 524.

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file a bill for partition against him, but died pending the suit, having devised his estate to infants, and there was a delay of eleven years before a title was made, it was held by Lord Romilly that the purchaser was not under the circumstances compellable to complete; but that if he elected to do so, he must pay interest from the time fixed for completion (*y*). In this case the delay was not wholly caused by the difficulties of the title, but was partly attributable to the vendor. There had, however, been no appropriation of the purchase-money; and the purchaser, who was not prejudiced by the delay, had neither threatened to rescind the contract nor taken active measures to enforce completion. On appeal this decision was affirmed; and Lord Justice Turner appears to have considered that there was no obligation on a vendor to enter into litigation with an adverse claimant in order to perfect his title (*z*); but it is conceived that this observation must have been intended to apply only to cases where the vendor, at the time of entering into the contract, is not aware of any adverse claim which may probably give rise to litigation.

The rule, however, as above propounded, affords ample scope for future litigation by leaving open the question as to what, in any given case, may be considered to amount to "vexatious conduct," "bad faith," or "gross negligence." The omission to deliver any abstract whatever, until long after the time fixed for completion, is *primâ facie* gross negligence which avoids the condition (*a*): although even such an omission might admit of a satisfactory explanation.

The mere fact, however, of the abstracts delivered prior to the time fixed for completion having shown an imperfect title, or having been supported by insufficient evidence, will not negative the vendor's claim to interest (*b*), even in cases

(*y*) *Williams* v. *Glenton*, 34 Beav. 528; L. R. 1 Ch. Ap. 200.

(*z*) *S. C.*, L. R. 1 Ch. Ap. 208.

(*a*) *Wallis* v. *Sarel*, 5 De G. & S. 429.

(*b*) *Rowley* v. *Adams*, 12 Beav. 476; *Cowpe* v. *Bakewell*, 13 Beav. 421.

where a period is fixed for the delivery of the abstract (c); but the fact of the completion of the agreement having been intercepted by negotiations, which resulted in a variation of the agreement, has been considered material in fixing the period from which interest is to run (d).

Conclusions to be drawn from the recent decisions.

From the cases cited above, it will be seen that the condition as to the payment of interest during delay in completion has been construed most strongly against the purchaser; and the rule, which in former editions we ventured to suggest as that which should ultimately prevail, has in a great measure been adopted; *viz.*, that the condition—whether with or without the words "from any cause whatever"—should be held to apply only to the case of a vendor who, selling without the knowledge or reasonable suspicion of any fact, which will probably prevent completion within the time specified, subsequently uses all due diligence to procure completion within such time: and that the rule should not be broken in upon by exceptions based upon the use of doubtful expressions referring to "default" or "failure" on the part of the purchaser; expressions which in some cases have been resorted to, probably rather from a willingness to adopt any plausible ground for depriving the vendor of the benefit of that which proves to be an inequitable stipulation, than from any settled judicial conviction that they were intended to point to a dereliction of a duty, as distinguished from the mere non-performance of an act, by the purchaser. And in adopting such a rule, all technical distinctions between questions of title, and questions of evidence of title, and questions of conveyance, may well be disregarded. The actual or implied stipulations in every contract which fixes a time for completion are, that the vendor shall, by that time, do three

(c) See *Vickers* v. *Hand*, 26 Beav. 630.

(d) *Sherwin* v. *Shakspeare*, 5 De G. M. & G. 517; and see *Southby* v. *Hutt*, 2 My. & Cr. 207; Dav. Conv. vol. i. 456; as to what is a perfect abstract, see *Parr* v. *Lovegrove*, 4 Drew. 177; and *vide suprà*, p. 281, and cases there cited.

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distinct things, *viz.*, abstract a sufficient title, verify a sufficient title, and give a proper conveyance: the stipulation on the part of the purchaser is that he shall, on the specified day, pay the purchase-money, which, if not then paid, is to carry interest. If then the money is not so paid, the only pertinent inquiry seems to be, whether the purchaser was or was not, through the default of the vendor, so situated as to be unable prudently to make the payment. If the purchaser, being ready with his money, is, through the default of the vendor, obliged to keep it wholly or in part unproductive, it is difficult to see why the liability to interest should depend upon the circumstance of such default consisting in the non-performance of one rather than of another of the vendor's several stipulated duties.

Savory v. Underwood.

A modern case (*e*), before the Court of Queen's Bench, deserves attention with reference to the present subject. It was that of a vendor selling an estate in mortgage, and stipulating that the purchase should be completed on a day earlier by some months, as he must have known, than the day on which the mortgagees were bound to receive their money: the common condition was held to apply; the existence of the incumbrance was not a question of *title*, and the purchaser was without remedy. Now in such a case the equitable arrangement would seem to be, that the purchaser, if willing to run the risk depending on the equitable rule as to the consolidation of securities (*f*), should take a conveyance of the equity of redemption, with a covenant by the vendor to get in the incumbrances; and should retain the amount of such incumbrances out of the purchase-money, paying such interest thereon as the amount so retained may actually produce—and the vendor keeping down the interest on the incumbrances: or that the purchaser, if not willing to run the risk above referred to, should be at liberty to vacate the contract. To allow a vendor, who has contracted to do that which he must have known he could not perform, to escape

(*e*) *Savory* v. *Underwood*, 23 L. T. 141.

(*f*) As to which *vide supra*, p. 503.

all liability for his own default, and at the same time to enforce the performance by the purchaser of his reciprocal obligation, is merely to encourage chicanery in the preparation of contracts and conditions of sale.

Where the condition is for payment of interest according to an ascending scale.

A stipulation binding the purchaser to pay interest during delay in completion, according to an ascending scale, is not in the nature of a penalty from which he may be relieved, but a separate contract which may be enforced against him (*g*).

Delay caused by adverse claim.

Where, after the title had been accepted, long delay resulted from notice being given of an adverse claim which was subsequently ascertained to be unfounded, the purchaser was held liable to pay interest from the time fixed by the contract (*h*).

Agreement to take rents and profits.

An agreement which reserves to the vendor the rents and profits of the estate until actual completion, precludes any claim to interest on the purchase-money (*i*).

Acquiescence.

A purchaser's silence may amount to acquiescence in the vendor's claim to interest (*k*): so, too, a mere repudiation of liability to pay interest, not followed up by active measures of resistance (*l*).

As to cases under the L. C. C. Act, 1845.

It was considered doubtful in one case whether the Court, upon a petition under the Lands Clauses Consolidation Act, has any jurisdiction to direct payment by the company of interest upon purchase-money which has been paid into Court, but has remained uninvested (*m*); and it has since been held that the Court has no such jurisdiction (*n*).

(*g*) *Herbert* v. *Salisbury and Yeovil R. Co.*, L. R. 2 Eq. 221.

(*h*) *Grove* v. *Bastard*, 1 De G. M. & G. 79; and see *Williams* v. *Glenton*, L. R. 1 Ch. Ap. 200, affirming *S. C.* 34 Beav. 528.

(*i*) *Brooke* v. *Champernowne*, 4 Cl. & Fin. 589; and see *Sweetland* v. *Smith*, 1 Cro. & Mee. 585, where a like effect was attributed to a condition providing for payment of expenses, but not referring to interest.

(*k*) *Ex parte Lord Hardwicke*, 1 De G. M. & G. 297.

(*l*) *Williams* v. *Glenton*, *ubi suprà*.

(*m*) See *Ex parte Lord Hardwicke*, 1 De G. M. & G. 304; in this case the company were ordered to pay interest, but the jurisdiction was given by consent.

(*n*) *Re Crystal Palace R. Co.*, 1 Jur. N. S. 995, V.-C. W.

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Deposit.

The vendor cannot claim from the purchaser interest upon the deposit for the time during which it has, through the latter's default, been retained by the auctioneer (*o*); but can claim interest upon purchase-money left in the purchaser's hands, to answer incumbrances payable at a future date (*p*). Whether the vendor can be compelled to pay interest on the deposit seems doubtful (*q*).

Income tax.

In paying the interest the purchaser may deduct income tax (*r*).

Increase of purchase-money in respect of excess in quantity.

The vendor may, occasionally, claim an increase of purchase-money, upon the ground of an excess in the actual quantity of the estate over that stated in the particulars.

As to quantity —Statutory Acre.

By the 5 Geo. IV. c. 74, ss. 1 and 2, the pole or perch is to contain in length five standard yards and a half; the rood, 1210 standard square yards; and the acre, 4840 standard square yards, being 160 square poles: and, by sect. 15, after the 1st May, 1825, "all contracts, bargains, sales, and dealings which shall be made or had within any part of the United Kingdom, for any work to be done, or for any goods, wares, merchandise, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be had and made according to the standard weights and measures ascertained by the Act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void."

(*o*) *Bridges* v. *Robinson*, 3 Mer. 694.

(*p*) *Hughes* v. *Kearney*, 1 Sch. & L. 134; *Comer* v. *Walkley*, Sug. 677, n.

(*q*) See Sug. 638; but allowed in bankruptcy, see *In re Page*, 1 Dru. & Wal. 31.

(*r*) *Bebb* v. *Bunny*, 1 K. & J. 216.

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The 5 & 6 Will. IV. c. 63, s. 6, enacts "that the measure called the Winchester bushel and the lineal measure called the Scotch ell, and all local customary measures (s), shall be abolished."

Local measures abolished.

Before the passing of these Acts, considerable diversity existed in the size of the acre (t); in some places (as in Cheshire) the customary acre contained nearly two statutory acres; while, occasionally, the variation was nearly as much the other way (u). The applicability of the 15th section of the Act of Geo. IV. to contracts for sale of land is not altogether clear (x); but, it is conceived, that, under the later Act, any quantities mentioned either in a contract or a conveyance would be referred to the standard measurement, without regard to any local custom (unless expressly referred to) (y).

Customary variations in the acre.

Where there is no express agreement on the subject, and the contract in general terms includes property which it was not proposed to sell, Equity would not enforce it against the vendor, without at least giving him compensation (z); but we are not aware of any case establishing his general right to additional purchase-money, merely because the estate exceeds the quantity stated in the particulars. Since, however, if it were sold professedly by the acre, the excess, if taken, must, it is conceived, clearly be paid for, it seems to follow, from the doctrine laid down in *Hill* v. *Buckley* (a) (*viz.*, that where the quantity is stated the price must be considered as fixed with reference thereto), that if

Vendor's right to compensation is generally questionable.

(s) See on the construction of the Act, as to dry goods, *Hughes* v. *Humphreys*, 3 El. & B. 954; and weights, &c., *Jones* v. *Giles*, 10 Exch. 119.

(t) Owing to variations in the length of the pole or measuring rod, the acre always containing 160 square poles or rods. Eight yards to the rod is the longest which has come under the author's observation. It gives 10,240 square yards to the acre instead of 4840.

(u) *Portman* v. *Mill*, 2 Russ. 570.

(x) Sug. 324.

(y) And see *Portman* v. *Mill*, 2 Russ. 570.

(z) See *Att.-Gen.* v. *Sitwell*, 1 You. & C. 559; *Marquis Townshend* v. *Stangroom*, 6 Ves. 328; see *Tyler* v. *Beversham*, Rep. t. Finch, 80; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1.

(a) 17 Ves. 394, 401.

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called upon to fulfil the contract, he might, independently of agreement, refuse to complete unless he were allowed compensation; and this, at any rate as regards cases where the excess is considerable, is in accordance with modern decisions (*b*).

Alleged under value from measurement being given in customary instead of statutory acres—no compensation.

A special condition for compensation has been, as respects different lots on the same sale, held to apply as well in favour of as against a vendor (*c*); but this was on a special case, and not in a suit. Where fields described as "fourteen acres more or less," were sold for 973*l*., under an order of the Court, and with the usual condition as to misdescription, a petition stating that the fields in fact contained twenty-seven statutory acres, (the acres mentioned in the particulars being intended for customary acres,) and that the real value was 1600*l*., and praying that the purchaser might pay the difference, or that the property might be re-sold, was dismissed with costs (*d*). The decision, however, was chiefly on the ground of delay, four years having elapsed since the sale; and the case may, perhaps, be considered to differ in principle from cases where there is a misstatement of quantity, incapable of being explained by the difference between statutory and customary measurement; for, possibly, the purchasers at the sale might have bid under the full impression that the fourteen acres were in fact customary acres, and this was alleged to have really happened. Lord St. Leonards' comment (*e*) upon the case is, "that no doubt it would be difficult in such a case to make a *boná fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it:" and it may be doubted whether a purchaser ought ever to be compelled, under such conditions, to pay a sum materially exceeding the contemplated amount of

Difficulty of forcing a more expensive purchase on a purchaser.

(*b*) See *Leslie* v. *Tompson*, 9 Ha. 273; *Newby* v. *Paynter*, 17 Jur. 483.

(*c*) *Leslie* v. *Tompson*, 9 Ha. 268; and see *Painter* v. *Newby*, 11 Ha. 26.

(*d*) *Price* v. *North*, 2 Y. & C. 620; and *vide suprà*, p. 140. See *Lethbridge* v. *Kirkman*, 25 L. J. Q. B. (N. S.) 89, where the misdescription was against the purchaser, and, being of a trivial character, was held to be covered by the condition.

(*e*) Sug. 820.

purchase-money; such an unexpected liability might, it is obvious, be often productive of the most oppressive and ruinous consequences: in the above case, the Court seems to have considered, that had any relief been granted, it must have consisted in avoiding the sale altogether; and thus nullifying the condition. There seems, however, to be no reason to doubt that such a condition can be insisted on by a vendor as defendant: but his right to enforce it as plaintiff has yet to be established.

Case of large excess of acreage, and condition against compensation.

A condition that "the description and quantity stated are believed to be correct; and that the sale shall not be annulled or rendered voidable, neither shall any compensation be required by vendors or purchaser, in case any inaccuracy or omission shall be discovered therein," may bind the vendor, although there has been a gross error, shared in by all parties, as to the acreage. Thus in a curious unreported case of *Walker* v. *Barnett* (1864), in which the writer was counsel for the purchaser, a house and grounds near London, which belonged in moieties to an eminent London solicitor and to his client, were advertised for sale by private contract, by a well-known firm of London estate agents. There was a printed form of contract, with a lithographed plan, but no scale. The property was described as containing "about ten acres;" and there was a condition, in the terms above stated, as to misdescriptions. Upon inspecting the property, the intending purchaser was incredulous as to the acreage amounting to ten acres. After some correspondence on the point, which failed to satisfy him, an offer was made in writing to and accepted by him, for the sale of the property for 10,000*l.*, upon the terms of the printed contract; but subject to a stipulation that if, upon measurement, the land was found to contain *less* than ten acres, the deficiency should be made up by a slice from adjoining land, also belonging to the vendors; nothing being provided in respect to the non-compensation clause, so far as such clause might operate against the vendors. The land was not measured until the surveyors on each side

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met for the purpose of setting out the compensation-slice; and was then found to contain not *less* than ten acres, but upwards of eighteen acres. The vendors, upon this, refused to complete, except at an advance in price: but, upon a bill being filed, a degree for a conveyance on payment of the 10,000*l*. was made against them, by V.-C. Stuart, with costs: and their advisers, although they expressed a strong disapproval of the decision—which may, to some extent, be attributable to the special nature of the property—did not venture to appeal against it.

Case of deficiency of acreage, and condition against compensation.

However, in a late case, where property, sold under a decree of the Court, was described in the particular as containing 753 square yards, but in fact contained only 573 square yards, and there was the usual condition against any conspensation for misdescription being allowed by either vendor or purchaser, it was held that the condition was intended only to cover small unintentional errors, and that, as the vendor by his counsel insisted on specific performance, the purchaser was entitled to compensation (*f*).

Variations in quality of estate—no allowance *semble* in favour of vendor.

As to the right to compensation in respect of variations in the quality of the estate,—there does not appear to be any case in which a vendor has obtained an increase of purchase-money, upon the ground of the character of the property being better than he had himself described it. And, as we have seen (*g*), he cannot claim any allowance for his own unauthorized expenditure upon the property subsequently to the contract.

Purchase-money, how diminished.

On the other hand, the purchase-money is liable to be diminished by deductions, either in respect of proceeds of the estate received, or which ought to have been received by the vendor, and which belong to the purchaser; or in respect of mere deteriorations to the estate; or of original defects in the estate.

(*f*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; and *vide suprà*, p. 142.

(*g*) *Suprà*, p. 248, n. (*u*).

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By proceeds of estate received or which might have been received by vendor.

As to deductions of the first descriptions;—We have already seen that the entire inheritance belongs to the purchaser from the date of the contract (h); but that the profits or income belong to him only from the time fixed for completion. If, therefore, timber be blown down (i), or felled, or stone or materials be quarried or worked, after the date of the contract, the proceeds must be accounted for at completion: so, the vendor must account for such rents and profits as he has, or might, but for his wilful default (k), have received from the time appointed for completion up to such time as the purchaser has, or might safely have, taken possession (l): and, in one case, where many years delay had occurred by the default of the vendor, who had received part of the purchase-money and retained possession of the estate, he was charged with interest at 4*l.* *per cent.* upon a proportionate part of the rents (m).

By amount of deteriorations to estate, through fault of vendor.

As to deductions of the second description;—The vendor from the date of the contract holds the estate in trust for the purchaser, subject to payment of the purchase-money; with a right, until the time fixed for completion, to receive the interim profits. If, therefore, by his wilful acts (n), or mere negligence (o), he cause or permit the property to deteriorate,—as by allowing hedges and fences to get out of repair, or the land to remain uncultivated (p), or by an improper course of husbandry (q), or by ejecting tenants, or acting so improvidently as to occasion their loss (r),—the purchaser is entitled to an allowance: and, of course, deterioration may be of such a nature, or to such an extent, as to relieve him from the contract (s): and the vendor must answer for deteriorations occasioned by the conduct of his tenant, even

(h) *Suprà*, p. 248.

(i) *Suprà*, p. 243.

(k) *Acland* v. *Gaisford*, 2 Madd. 28; *Wilson* v. *Clapham*, 1 Jac. & W. 36; see *Crosse* v. *Duke of Beaufort*, 5 De G. & S. 7; *vide suprà*, p. 628.

(l) *Vide suprà*, p. 628.

(m) *Burton* v. *Todd*, 1 Sw. 255. See the order, *ib.* 263, 264.

(n) 3 Madd. 395.

(o) See *Regent's Canal Co.* v. *Ware*, 23 Beav. 575.

(p) *Foster* v. *Deacon*, 3 Madd. 394; *Townsend* v. *Champernowne*, 3 Y. & C. 505, 508.

(q) *Lord* v. *Stevens*, 1 Y. & C. 222.

(r) *Harford* v. *Purrier*, 1 Madd. 532.

(s) *Vide infrà*, Ch. XVIII.

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although the lease has expired (t): but not for deteriorations after the time fixed for completion, if the title shown were such that the purchaser ought to have taken possession (u).

Phillips v. *Sylvester.*

But in a very recent case (x) the rule as to a vendor's liability for deteriorations to the estate was carried much further than in the cases to which we have just referred. There was a dispute between the vendor and purchaser as to what was included in the contract, the latter claiming, and the former not admitting, that a small strip of land formed part of the purchase; pending the dispute, the vendor (y) refused to give up possession of the estate, except upon payment of the whole purchase-money, and took no steps either to procure a tenant for the property, or to preserve it from dilapidation. After fruitless negotiations, extending long past the time fixed for completion, the vendor filed a bill and obtained a decree for specific performance, excluding the strip. It was held by Lord Selborne, C., affirming Lord Romilly, that, as a set off to the interest payable by the purchaser under the contract on his purchase-money, the vendor must be charged with what he would, but for wilful default, have received for rent, and also with the dilapidations; and accounts between the parties were directed on this footing. It was admitted that the delay in completion was solely attributable to the purchaser, and that the vendor in refusing to give up possession acted only within his strict rights; but it was held that having retained possession, he was under the same obligations as any other person who, having a charge on the land, insists on the possession of the land itself as a further security. This decision was strongly disapproved of by Sir George Jessel, M. R., when the cause came on before him for further consideration. As his Honour remarked, the reasoning upon which it is based is wholly inconsistent with the law as laid

(t) 3 Madd. 395.

(u) *Binks* v. *Lord Rokeby*, 2 Sw. 222, 226; *Minchin* v. *Nance*, 4 Beav. 332.

(x) *Phillips* v. *Sylvester*, L. R. 8 Ch. Ap. 173.

(y) The dispute was in fact between the purchaser and the representatives of the vendor, who had died shortly after the contract.

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down by the Court, in *Sherwin* v. *Shakespeare*, and followed in subsequent cases. A vendor who retains possession of the estate until completion of the purchase, does so, not in the character of a mortgagee for better protecting his lien for unpaid purchase-money, but in the character of a trustee (using the term in a qualified sense, and not as implying the active obligations of an ordinary trusteeship) for the purchaser; and, as in the case of a trustee, so *à fortiori*, in the case of a vendor so circumstanced, it is only under special circumstances that he ought to be charged with wilful default as respects the due preservation of the property; especially where, as in the case just referred to, the non-completion of the purchase by the appointed time is occasioned by the purchaser's own default. If the rule were otherwise, a vendor might find himself compelled to make a heavy outlay for repairs or the like (as, *e.g.*, on the sale of a mill and machinery), which might be objected to by the purchaser as unnecessary or improper; and, unlike a mortgagee or trustee, he would have no means except by a suit, or possibly by a summons under the 37 & 38 Vict. c. 78 (*z*), of recovering from the purchaser the amount which he has so expended.

Abatement in purchase-money in respect of original defects in estate.

So, also, compensation may be due to the purchaser out of the purchase-money in respect of original defects in the estate, either as respects its quantity, or quality, or the extent of the vendor's interest therein. It may be convenient here to consider those questions which relate merely either to the quantity or quality of the estate; reserving for separate discussion, under the head of specific performance, those questions which are in fact questions of title (*a*).

Abatement allowed for deficiency although land not professedly sold by the acre.

The purchaser will be entitled to compensation for a deficiency in quantity, even although the estate be not sold professedly by measurement (*b*): and although, of course, he could not claim compensation if it appeared that he contracted

(*z*) Sect. 9.

(*a*) *Vide infrà*, Ch. XVIII.

(*b*) *Hill* v. *Buckley*, 17 Ves. 394, 401; *King* v. *Wilson*, 6 Beav. 124.

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with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the property (c), or even being the occupying tenant (d): nor is the right to compensation precluded by a condition that he shall not object to complete his purchase, if the quantity should turn out less than that stated in the particulars (e); nor by acts which amount to a waiver of objections to the title (f).

As to the effect of the expressions "by estimation," "more or less," &c.

The above rule, where the estate is professedly bought by the acre, or (which is the same thing) (g) where the quantity is stated, and there is nothing to rebut the ordinary presumption of price having been fixed with reference to quantity, may, it is conceived, be strictly enforced, where no words are introduced to qualify the statement as to quantity. The qualifying expressions, "by estimation," and "be the same more or less," are, however, in very general use; and the cases do not seem to define their precise effect (h): they have been held to include a small adjoining strip of land over which the grantor had exercised acts of ownership, although the dimensions and boundaries of the property conveyed were stated in the description (i); so, on the other hand, they have been held to cover a deficiency of upwards of five out of forty-one acres (k); but not of 100 out of 349 acres (l); so, in a case of *Gell* v. *Watson* (m), similar expressions were not allowed to cover a deficiency of two acres in two closes forming part of a much larger estate, the quantity of the two closes being stated to be (*according to a specified plan*) 8 a. 1 r. 4 p.

What deficiency they will cover.

(c) See *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609.

(d) *King* v. *Wilson*, 6 Beav. 124.

(e) *Frost* v. *Brewer*, 3 Jur. 165.

(f) *Calcraft* v. *Roebuck*, 1 Ves. J. 221.

(g) 17 Ves. 401.

(h) See *Marquis Townshend* v. *Stangroom*, 6 Ves. 328, 341; *Hill* v. *Buckley*, 17 Ves. 394; *Neale* v. *Parkin*, 1 Esp. 229; *Anon.*, cited Freem. C. C. 106; *Davis* v. *Shepherd*, L. R. 1 Ch. Ap. 416, 418.

(i) *Dendy* v. *Simpson*, 6 Jur. N. S. 1197; 8 C. B. N. S. 1058; affirmed 7 Jur. N. S. 1058.

(k) *Winch* v. *Winchester*, 1 Ves. & B. 375.

(l) *Portman* v. *Mill*, 2 Russ. 570. N. B. In this case, the deficiency appears to have been in the cultivated land.

(m) Sug. 325; and see *Leslie* v. *Tompson*, 9 Ha. 268, 273.

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Cordingley v. Cheeseborough.

In a modern case, on a sale by auction, the property was, by an unintentional error, described as containing "an area of 7083 square yards, or thereabouts," when in fact it contained only 4350 square yards. By the 10th condition it was provided that if the purchaser should make any requisition as to title, compensation, &c., which the vendor should be unwilling to comply with, the latter should have the usual power of vacating the sale; and by the 17th condition the admeasurements were "to be presumed correct," and no compensation allowed or required in respect of any inaccuracy. The purchaser, after having taken possession, and after the date fixed for the completion of the contract, claimed compensation, whereupon the vendor elected to rescind the contract. On a bill by the purchaser for specific performance with a compensation, V.-C. Stuart decreed specific performance, but only upon payment of the purchase-money in full: the purchaser being willing to take the land at the full price rather than lose it altogether. On appeal, this decision was affirmed by Lord Westbury: but his Lordship in his judgment expressed his opinion that the 17th condition was intended to cover only the consequences of inconsiderable errors; and intimated that upon the case before him the condition could not have been enforced by the vendor had he been plaintiff instead of defendant in a suit for specific performance (*n*). On the same principle in a later case, where the contract was for the sale of an estate containing 21,750 acres, the actual acreage being afterwards ascertained to be only 11,814 acres, and the price appeared to have been fixed with reference to the rental, the Court refused, at the suit of the purchaser, to decree specific performance on payment of the purchase-money, less a proper compensation for the deficiency in quantity (*o*).

Semble—only deficiencies in the fractional parts of the

Where land is described particularly, by stating not only the acres but also the roods, or roods and poles, the

(*n*) *Cordingley* v. *Cheeseborough*, 3 Jur. N. S. 585, 755; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *suprà*, pp. 141, 648. The former case (see the Report) was in effect an appeal from the author's opinion given as referee.

(*o*) *Earl of Durham* v. *Legard*, 11 Jur. N. S. 706.

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acre, when the description particularizes fractional parts.

qualifying expressions "by estimation," "more or less," or "thereabouts," cannot, perhaps, be held to provide for more than inaccuracies in the roods or poles (*p*): and, of course, a vendor cannot, in any case, rely upon such expressions, if he fraudulently misstate the quantity (*q*).

Purchaser's right confined to compensation.

The purchaser's right is strictly to compensation, and not necessarily to an abatement of purchase-money proportionate to the surface deficiency: thus, where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain more by twenty-six acres than the actual quantity, he was allowed, as compensation, the estimated value of twenty-six acres of woodland *minus* the wood (*r*). The case is valuable as illustrating a principle; but, as a decision between parties, its justice may be thought questionable: for it is clear that in purchasing woodland (unless there be no *growing timber*), the value of the estate depends, not only upon the present worth of the timber and of the land apart from it, but upon the two taken together, with reference to the relative situations of the trees being such as to afford them sufficient nourishment and full space to arrive at maturity.

Surface deficiency on sale of woods.

Abatement in purchase-money in respect of deficiency in quality may be claimed, when.

As respects the quality of the estate,—A purchaser, it appears, may claim compensation in respect of any deficiency which "admits of a certain estimation" (*s*): for instance, he may claim it for dilapidations of a house described as "in good repair" (*t*); or for the want of cultivation of land described as being in "a high state of cultivation" (*u*); or for the want of a natural water supply, where a manufactory in a place abounding in springs was described as well supplied with water, and there was in fact only an artificial supply on payment of a water rate (*x*); but not for

(*p*) 17 Ves. 401; 9 Jarm. C. by S. 87.

(*q*) 1 Ves. & B. 377; *Duke of Norfolk* v. *Worthy*, 1 Camp. 340; Sug. 825.

(*r*) *Hill* v. *Buckley*, 17 Ves. 394; see form of order, Seton, 619.

(*s*) 10 Ves. 508.

(*t*) *Dyer* v. *Hargrave*, 10 Ves. 505; *Grant* v. *Munt*, G. Coop. 173.

(*u*) *Dyer* v. *Hargrave*, *ubi suprà*.

(*x*) *Leyland* v. *Illingworth*, 2 De G. F. & J. 248.

that which does not admit of a pecuniary equivalent: for instance, it is doubtful whether compensation could be claimed in respect of the land lying dispersed, instead of within a ring fence, as described (y); although such a variation might be sufficient to avoid the sale: and he cannot claim compensation in respect of a misdescription known to him when he entered into the contract (z).

Interest on abatement.

If the vendor have received the purchase-money, he must, in refunding the amount of abatement, pay interest upon it (a).

Investment of purchase-money;—loss or gain on.

If the purchaser, without the vendor's sanction, invest the purchase-money, he of course takes all the risk of the investment, and is entitled to the profit, if any; but the risk and possible benefit of the investment are alike shifted to the vendor if it be made with his approval (b).

(5.) *As to execution by the parties.*

Section 5.

As to execution by the vendor.

As a general rule, a purchaser may insist on having the conveyance executed in his own presence, or attested by a witness of his own selection (c): but the rule is not invariable; and, in the absence of special circumstances, ought not to be insisted on, where it cannot reasonably be complied with (d).

General rules as to vendors' duties may be modified by circumstances.

In fact many of the general rules laid down in the present work, relating to the liability of vendors, in respect to their personal action, must be considered to depend in some indefinable degree upon the extent and value of the property agreed to be sold and the personal status of the parties. Requisitions on the part of a purchaser which might be

(y) *S. C.*; *Fewster* v. *Turner*, 6 Jur. 144.

(z) See last note.

(a) *Ferguson* v. *Tadman*, 1 Sim. 530.

(b) *Burroughes* v. *Browne*, 9 Ha. 609, 613.

(c) *Viney* v. *Chaplin*, 4 Drew. 237; 2 De G. & Jo. 468.

(d) *S. C.*

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perfectly reasonable upon the sale of a considerable estate, or even on a small transaction between parties in the same rank and station in life, might be evidently unreasonable if insisted upon in a petty transaction between parties of widely different stations and positions. So, too, other circumstances personal to the vendor may occasionally render that an unreasonable, which would otherwise be a reasonable, requisition on the part of a purchaser.

Section 6.

To whom and how purchase-money should be paid.

(6.) *To whom and how purchase-money should be paid.*

The agent (*e*) or solicitor (*f*) of the vendor, cannot, without special authority, receive and give a discharge for the purchase-money: and the usual indorsed receipt is, in Equity, no conclusive evidence of payment (*g*). The money, therefore, should in strictness be paid to the vendor personally, or upon his written authority; and it has been held that a purchaser may insist either on personal payment, or on the production of a written authority (*h*).

To trustees.

In the case of a fiduciary vendor, care should be taken that the proposed mode of payment does not involve a breach of trust (*i*); *e.g.*, it is a breach of trust for trustees for sale to authorize their solicitor to receive the purchase-money (*k*): every trustee authorizing such receipt will be liable; nor can the purchaser be considered safe. However, in a modern case, Lord Romilly held that where there is the usual declaration that the trustees' receipt shall be a good

(*e*) *Suprà*, p. 186.

(*f*) Sug. 667; and see *Re Fryer*, 3 K. & J. 317.

(*g*) *Winter* v. *Lord Anson*, 3 Russ. 488; *infrà*, Ch. XIV.; and see *Hawkins* v. *Gardiner*, 2 Sm. & G. 441; nor is an endorsed receipt, even at Law, conclusive evidence of payment, see *Stratton* v. *Rastall*, 2 T. R. 366.

(*h*) *Viney* v. *Chaplin*, 4 Drew. 237; 2 De G. & Jo. 468, 482.

(*i*) See *Webb* v. *Ledsam*, 1 K. & J 385.

(*k*) See *Ghost* v. *Waller*, 9 Beav. 497; *Rowland* v. *Witherden*, 3 Mac. & G. 568; *Waugh* v. *Wyche*, 2 Dre. 326; *Griffiths* v. *Porter*, 25 Beav. 236; *Bostock* v. *Floyer*, L. R. 1 Eq. 26; but see *Re Bird*, L. R. 16 Eq. 203. See, however, as to assignees in bankruptcy, *Hughes* v. *Morris*, 9 Ha. 636, but note the grounds of the decision, p. 646; *Bourdillon* v. *Roche*, 27 L. J. Ch. 681.

discharge, the purchaser is bound, upon the trustees signing the usual receipt, to pay the money as they direct; that such a payment is equivalent to a payment to the trustees themselves; and that the purchaser is exonerated from the consequences of misapplication of the money, unless he pays it under express notice that the proposed recipient is about to deal with it in such a manner as will amount to a breach of trust (*l*). So, in a later case, the same learned judge laid it down that "where a person is authorized by trustees to receive trust money, and receives it accordingly, the receipt of the money by the agent binds the trustees and discharges the person who pays it (*m*).

The opinions of eminent practitioners are understood to differ as to the soundness of this doctrine. Its practical convenience is unquestionable. Of course, the money cannot, except under a special power in the instrument creating the trust, be safely paid upon the receipt of fewer than the entire body of trustees (*n*); and every trustee who joins in the receipt will be *primâ facie* responsible for the whole amount; and although he may discharge himself by showing that he joined merely for conformity, he will still be chargeable if he allow the money to remain unnecessarily in the hands of the actual recipient (*o*). It was remarked in a late case by an eminent judge, that he knew of no authority for holding a man liable to pay over again his purchase-money which he has paid to one of several trustees on a receipt signed by all (*p*): the point, however, was not decided, and seems to be questionable: and such a mode of payment can scarcely be recommended in practice. The

(*l*) *Hope* v. *Liddell*, 25 L. J. Ch. 90; 21 Beav. 183, 202, 203; *Mc-Carother* v. *Whieldon*, 34 Beav. 107; but see *Pell* v. *De Winton*, 2 De G. & Jo. 13; Lewin on Trusts, 6th ed., p. 413.

(*m*) *Robertson* v. *Armstrong*, 28 Beav. 123; *sed quære*.

(*n*) *Brice* v. *Stokes*, 11 Ves. 319; 2 Wh. & Tud. L. C. 4th ed. 865; *Hall* v. *Franck*, 11 Beav. 519; *et vide suprà*, p. 607.

(*o*) *Brice* v. *Stokes*, 11 Ves. 319; *Thompson* v. *Finch*, 22 Beav. 316.

(*p*) *Webb* v. *Ledsam*, 1 K. & J. 385; and see and consider *Charlton* v. *Earl of Durham*, L. R. 4 Ch. Ap. 433, and remarks of V.-C. James in note at p. 437.

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opinion of Lord St. Leonards on the point may be surmised from his advising (q) that where all the trustees cannot be got together, the money should be paid into a bank, to their joint account, on their written authority; which seems to be an unexceptionable arangement.

Liability of trustees *inter se.*

Where, on a sale by two trustees, a cheque for the proceeds was handed by one to the other, who misapplied it, both were held liable (r); but where a trustee obtains possession of the money by an act of dishonesty, and without the knowledge of his co-trustee, the latter is not liable for its misapplication (s). Of course, a receipt signed by one trustee on behalf of himself and his co-trustee, is not a sufficient discharge to the purchaser (t); and in one case, where property was in mortgage to three trustees, and a solicitor on behalf of his client prepared a transfer, which was executed by the mortgagor and two of the trustees, though no money was actually paid, the deed was held inoperative as against both the mortgagor and the trustees (u). Where trustees for sale employ one of their own number as their solicitor in the transaction, payment of the purchase-money to him will be considered as made in his capacity of trustee, and not as solicitor (x).

Payment to agents.

When an agent is empowered to receive the money, there must be a *bonâ fide* payment; for instance, it cannot be set off against a private debt due from him to the purchaser (y), unless the vendor, being indebted to the agent, have authorized him not merely to receive, but to pay himself out of it (z): and where the same solicitors acted for both parties,

(q) Sug. V. & P. 14th ed. 667, and see Lewin on Trusts, 6th ed., p. 413.

(r) *Trutch* v. *Lamprell*, 20 Beav. 116; and see *Griffiths* v. *Porter*, 25 Beav. 236.

(s) *Barnard* v. *Bagshaw*, 9 Jur. N. S. 220. See as to trustee not being responsible for failure of the bank in which the purchase-money is temporarily invested, *Wilks* v. *Groom*, 2 Drew. 584.

(t) *Hall* v. *Franck*, 11 Beav. 519; and see *Heath* v. *Crealock*, L. R. 18 Eq. 215.

(u) *Griffin* v. *Clowes*, 20 Beav. 61.

(x) *In re Fryer*, 3 K. & Jo. 317.

(y) *Young* v. *White*, 7 Beav. 506.

(z) *Barker* v. *Greenwood*, 2 Y. & C. 414; *Hanley* v. *Cassan*, 11 Jur. 1088, Exch. As to how the loss of money by the fraud of a person acting as agent for both parties, is to be borne

being authorized by the vendors to receive the purchase-money, and by the purchaser to apply for that purpose money of his which they had in their possession, and the agents in their accounts with their respective clients credited the vendors and debited the purchaser with the amount, the latter, on the bankruptcy of the solicitors, was still held liable to pay the purchase-money, the vendors not having sanctioned that particular mode of payment (a). So, in a recent case, where the purchaser's attorney was appointed for that turn deputy steward of a manor, for the purpose of taking the purchaser's admittance, and received from him payment of the lord's fine, steward's fees, and his own professional charges in a single cheque, which, on being paid into his bankers, was retained by them in part discharge of his overdrawn account, it was held in an action by the lord against the purchaser, that, even assuming that the steward had power to authorize, and had authorized, the deputy to receive the fine for the lord, this did not warrant his accepting payment otherwise than in cash (b). So, if an agent be authorized to receive the money according to the contract, and it be paid to him in anticipation of the time therein named, the purchaser is liable for its due application (c).

Payment by cheque.

If a cheque be given for it, and, by reason of an unintentional non-compliance with the Stamp Act, be so drawn that no action could be maintained upon it, and the bankers upon whom it is drawn fail before payment, or if, (supposing it to be valid and to be presented within a reasonable time,)

see *Vandaleur* v. *Blagrave*, 6 Beav. 565; on app. 11 Jur. 935; *Young* v. *Guy*, 8 Beav. 147; *Hiorns* v. *Holton*, 16 Beav. 259; *West* v. *Jones*, 1 Sim. N. R. 205; *Griffin* v. *Clowes*, 20 Beav. 61. As to the purchaser's liability for a fraudulent application of the purchase-money, to which his solicitor, acting also for the vendor, was privy, see *Doe* v. *Martin*, 4 T. R. 39, 66; see too *Hicks* v. *Morant*, 3 Y. & J. 286; *S. C.*, 2 Dow. & C. 414; *Bowles* v. *Stewart*, 1 Sch. & L. 222.

(a) *Wrout* v. *Dawes*, 25 Beav. 369.

(b) *Bridges* v. *Garrett*, L. R. 4 C. P. 580; and see too *Sweeting* v. *Pearce*, 9 C. B. N. S. 534; 30 L. J. C. P. 109.

(c) *Parnther* v. *Gaitskell*, 13 East 432; *Cotman* v. *Orton*, 5 Jur. 142, C.; *et vide suprà*, p. 191; *Hughes* v. *Morris*, 9 Ha. 646.

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the bankers, upon receiving it with instructions to transmit the amount to London, on the same day, and before the usual hour for closing business, stop payment, the loss falls on the purchaser (*d*): so, if presentation of the cheque be delayed at his request, and the bank fail in the interval (*e*): so, if the cheque include moneys payable to other persons, and is not immediately available for the vendor as cash, the purchaser must take the risk (*f*). Of course, the vendor may decline to take a cheque (*g*). A mutual agent, upon whom a bill of exchange is, according to the contract, drawn by the purchaser in favour of the vendor, cannot, without the consent of the latter, enter the same to his credit before it arrives at maturity; so that if the agent fail in the interval, the loss falls on the purchaser, although the bill has been so entered, and might have been drawn against by the vendor (*h*).

Joint vendors.

Any one of several joint vendors can, at Law, give a discharge for the entire purchase-money (*i*); but this is not the rule in Equity: nor does it in Law extend to a case where persons collectively entitled to an estate agree to sell under terms constituting several contracts in relation to their respective shares. In one case, where an equitable charge was vested in two persons as joint tenants in their own right, and one only without the express authority of the other signed a receipt for the whole mortgage debt, it was held that the land was not effectually discharged, and that the title could not be forced on an unwilling purchaser (*k*).

(*d*) *Bond* v. *Warden*, 1 Coll. 583; *Lord Ward* v. *Oxford, &c. R. Co.*, 2 De G. M. & G. 750; the Court will not compel the delivery up of a void cheque, *Carrington* v. *Pell*, 3 De G. & S. 512.

(*e*) *Lord Ward* v. *Oxford, &c., R. Co.*, 2 De G. M. & G. 750.

(*f*) *Bridges* v. *Garrett*, L. R. 4 C. P. 80.

(*g*) *Clarke* v. *King*, 2 Car. & P. 286.

(*h*) *Maxwell* v. *Deare*, 1 C. L. R. 776

(*i*) See *Wallace* v. *Kelsall*, 7 M. & W. 264; *Husband* v. *Davis*, 10 C. B. 645.

(*k*) *Matson* v. *Dennis*, 10 Jur. N. S. 461; 4 De G. J. & S. 345.

Where the conveyance is executed under a power of attorney, the proper course seems to be to let the purchase-money be invested in the names of trustees, at the expense and risk of the vendor, until satisfactory evidence is adduced of the validity of the power at the date of the execution of the conveyance.

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Sale under power of attorney.

Upon a sale in bankruptcy, under the former Law, the purchase-money was payable to the official assignee, unless the Court otherwise directed (*l*); but under the Act of 1861, it was the duty of the creditor's assignee to realise and recover the bankrupt's estate, and to convert the same into money (*m*); and the duty of the official assignee was confined to the collection and recovery of debts due to the estate not exceeding in each case the sum of 10*l*. (*n*). And now, under the Act of 1869, it is the duty of the trustee to sell the bankrupt's property, and he is competent to give receipts for the purchase-money (*o*).

On sale in bankruptcy.

Where A., in ignorance of the purchaser being an uncertificated bankrupt, advanced part of the purchase-money, and paid it direct to the vendor, and the conveyance was handed over to him immediately after its execution, he was held to have a valid lien upon the property; although the purchaser at the same time signed a memorandum stating that he had deposited the deed with A. as a security for the advance (*p*).

Lien of third party advancing part of the purchase-money, as against purchaser's assignees in bankruptcy.

A purchaser of land subject to a pecuniary *charge* cannot pay the amount into Court under the Trustees Relief Act (*q*):

Trustees Relief Acts.

(*l*) 12 & 13 Vict. c. 106, s. 39.

(*m*) See 24 & 25 Vict. c. 134, s. 127.

(*n*) See sect. 128.

(*o*) See 32 & 33 Vict. c. 71, s. 25.

(*p*) *Meux* v. *Smith*, 11 Sim. 410; which see, as to the usual mode of payment for public houses. *Bonâ fide* payments by purchaser, after his secret act of bankruptcy, but before petition, were protected by 12 & 13 Vict. c. 106, s. 133; and see now 32 & 33 Vict. c. 94.

(*q*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74; *Re Buckley*, 17 Beav. 110; and see *re* Cooper's Legacy, 17 Jur. 1037; Lewin on Trusts, 6th ed., pp. 835 *et seq.*; and see now as to the procedure under this Act, Rule 34 of the Chancery Rules of Dec. 1874. The County Courts have no jurisdiction where the sum exceeds £500; see 28 & 29 Vict. c. 99, s. 1; 30 & 31 Vict. c. 142, s. 24.

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but this course may be adopted as a mode of perfecting the title, when trustees have power to sell but no power to give receipts (*r*): so, also, which can rarely happen, if there be a charge payable to trustees who have no power to give a valid discharge for it: so, if by reason of adverse claims, or the disability of the mortgagor, a mortgagee, selling under his power is unable to obtain a discharge for the surplus proceeds of sale (*s*). So, where there are conflicting claims to the proceeds of sale, the amount can, by arrangement, be paid to trustees, in trust for the rightful owners: the right to be ascertained, if necessary, by means of a payment into Court, and a petition under the Act (*t*). And the Act affords a convenient means of securing the safe custody of money or stock appropriated as an indemnity against future or contingent incumbrances or liabilities.

Payment of consideration-money upon sale by statutory owners to railway companies, &c.

Upon a sale by a mere statutory owner, under the Lands Clauses Consolidation Act, 1845, the entire purchase and compensatiom moneys, if amounting to 200*l*., must be paid into the bank, or (if under 200*l*. but exceeding 20*l*.), into the bank or to trustees, and be applied in manner directed by the 69th and following sections of the Act: and no part thereof can be safely paid to such statutory owner. The above provisions extend to moneys agreed to be paid to him for assenting to or not opposing the passing of the bill authorising the taking of the lands; but the Court of Chancery or the trustees, as the case may be, may allot to him a portion of the sum so paid, as a compensation for personal injury, inconvenience or annoyance (*u*). Statutory vendors having pressed for and received the purchase-money, have been compelled, on the application of the purchasers, to bring it into Court (*x*).

How moneys

The moneys so paid into Court are to remain deposited

(*r*) *Cox* v. *Cox*, 1 K. & J. 254; and see Trustee Act, 1850, sect. 48.

(*s*) *Roberts* v. *Ball*, 1 Jur. N.S. 585.

(*t*) *Re Russell Road purchase-moneys*, L. R. 12 Eq. 78.

(*u*) Sect. 73; see *In re the Duke of Marlborough's Estates*, 13 Jur. 738; *Ex parte the Rector of Little Stepney*, 5 Rail. Ca. 207.

(*x*) *London and N. W. R. Co.* v. *Corp. of Lancaster*, 15 Beav. 22.

until applied in some one or more of the following purposes; *viz.*, the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land, or other lands settled to the same uses—the purchase of other lands to be settled to the same uses, &c., as the lands taken,—the removing and replacing of buildings and substituting others in their stead, where the money is paid in respect of any buildings taken—or the payment to any person becoming absolutely entitled to the money (*y*).

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deposited are to be applied under the 69th section.

This section has been liberally construed; thus it has been held that a tenant for life, who has redeemed the land-tax, may recoup himself out of the purchase-moneys paid into Court (*z*); so, the buying up of a quit-rent (*a*), or of a lessee's interest (*b*), and the enfranchisement of copyholds (*c*), have been held to be a discharge of incumbrances within the Act: so, too, the purchase-money of lands of a municipal corporation may be applied in redeeming incumbrances upon any other lands of the same corporation (*d*); and, in the case of a rector, may be applied in discharging his other lands from the expenses of an inclosure (*e*).

Cases on this section: as to the discharge of incumbrances, &c.;

The purchase-money of freehold or leasehold lands may be invested in the purchase of copyholds of inheritance (*f*); or in buying up the reversion in fee of other leaseholds belonging to the same parties (*g*); but the purchase-moneys of freehold and copyhold lands will not be re-invested in the purchase of leaseholds (*h*).

as to purchase of other lands;

(*y*) 8 Vict. c. 18, s. 69.

(*z*) *Ex parte Lord Northwick*, 1 Y. & C. Ex. 166; and see *Re London, Brighton, and S. C. R. Co.*, 18 Beav. 608.

(*a*) *Ex parte Studdert*, 6 Ir. Ch. Rep. 53.

(*b*) *Re Manchester, Sheffield, and Lincolnshire R. Co.*, 21 Beav. 162; see also *Ex parte Bishop of London*, 2 De G. F. & Jo. 14.

(*c*) *Dickson* v. *Jackson*, 25 L. J. Ch. 588; *Re Cheshunt College*, 3 W. R. 638; Seton on Decrees, p. 1067.

(*d*) *Ex parte Corporation of Cambridge*, 6 Ha. 30.

(*e*) *Ex parte Lockwood*, 14 Beav. 158; *Ex parte Queen's College*, *ib.* 159, n.

(*f*) See *Re Liverpool Docks*, 1 Sim. N. S. 202; *Re Cann's Estate*, 15 Jur. 3. *Vide infrà*, p. 669.

(*g*) *Re Brasher's Trusts*, 6 W. R. 406.

(*h*) *Re Lancashire and Yorkshire R. Co.*, 2 W. R. 667.

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as to expenditure on permanent improvements.

So, too, the purchase-moneys may be applied in effecting permanent improvements on other portions of the estate, as *e.g.*, by the drainage of glebe lands (*i*), or by the erection of a new parsonage-house (*k*), or of permanent improvements and additions to the parsonage-house (*l*), or of new farm-buildings in substitution for others rendered useless or less convenient by the proximity of the railroad (*m*); or by the re-building of houses upon other portions of the settled property which the Metropolitan Building Acts required to be reinstated (*n*); or by the erection of cottages upon a part of the estate, which was lying unproductive (*o*). But, the Court will not, it seems, allow the purchase-money to be applied in building or re-building on other portions of the estate, if the remaindermen object (*p*); or in reimbursing the tenant for life what he has expended in repairs or permanent improvements (*q*); or in recouping a rector the costs which he has himself incurred in re-building the parsonage-house (*r*); and in the absence of special circumstances showing that such a re-investment will be beneficial to the *cestuis que trust*, the Court will not allow the purchase-money to be laid out in buildings which will produce no income; thus, where a corporation was authorized to erect public offices and to levy rates for defraying the expense, L. J. Turner (*dissentiente*, L. J. Knight Bruce,) was of opinion that the purchase-money for a portion of the municipal property, not consisting of buildings, could

(*i*) *Re Vicar of Queen Camel*, 11 W. R. 503.

(*k*) *Re Incumbent of Whitfield*, 1 J. & H. 610; and see *ex parte Rector of Hartington*, W. N. 1875, p. 43, V.-C. Hall.

(*l*) *Ex parte Rector of Claypole*, L. R. 16 Eq. 574.

(*m*) *Ex parte Melward*, 27 Beav. 571.

(*n*) *Re Davis' Estate*, 3 De G. & Jo. 144.

(*o*) *Re Dummer's Will*, 2 De G. Jo. & S. 515; *dubitante* L. J. Knight Bruce. For other cases see *Re Wigan Glebe Act*, 3 W. R. 41; *Re Parrington's Estate*, 1 N. R. 177; *Re St. Thomas's Hospital*, 11 W. R. 1018; *Re Lathropp's Charity*, L. R. 1 Eq. 467; and compare *re Nether Stowey Vicarage*, L. R. 17 Eq. 156, a case under the Land Tax Redemption Act, 42 Geo. III. c. 116, s. 100; and *Brunskill v. Caird*, L. R. 16 Eq. 493; and *re Newman's Settled Estates*, L. R. 9 Ch. Ap. 681, cases under the Settled Estates Acts.

(*p*) *Re Leigh's Estate*, L. R. 6 Ch. Ap. 887.

(*q*) *Ib.*

(*r*) *Williams v. Aylesbury and Bucks R. Co.*, L. R. 9 Ch. Ap. 684.

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not be applied in the erection of the public offices, as this would be an unproductive investment (s). Where, however, the effect of the construction of the line was to divert business from trade premises on another portion of the estate, and thus render them useless for trade purposes, part of the purchase-money was ordered to be applied in taking down the existing buildings and erecting dwelling-houses on their site (t); so, also, in the removal of a stack-yard, and the roofing with slate or tile farm-buildings which were rendered uninsurable by the proximity of the rail-road (u).

Where balance in court is less than 20*l.*

An order for the re-investment of part of the money in land may also direct that the balance, if less than 20*l.*, be paid to the tenant for life (x); and, in one case, a balance of 30*l.*, remaining after the purchase of an estate, was ordered to be paid to the tenant for life, on his undertaking to apply it in permanent improvements (y); but where the balance was 20*l.* 10*s.*, the Court refused to order payment to the tenant for life in liquidation of extra costs beyond those allowed by the Act (z).

Apportionment of purchase-money on sale of leaseholds.

As between lessee and reversioner, the Court has no jurisdiction to order an apportionment of the corpus of the purchase-money (a). Where the estate was charged with an annuity, which the income of the purchase-money was insufficient to satisfy, a periodical sale of a sufficient part of the trust fund was directed to meet the accruing payments of the annuity (b). So, where the property is held under a lease, the tenant for life is entitled to the same income

(s) *Ex parte Corporation of Liverpool*, L. R. 1 Ch. Ap. 596.

(t) *Re Johnson's Settlements*, L. R. 8 Eq. 348.

(u) *Ibid.*

(x) See sect. 72. *Re Lord Egremont*, 12 Jur. 618; *Ex parte the Rector of Little Stepney*, 5 Rail. Ca. 207.

(y) *Ex parte Barrett*, 15 Jur. 8, V.-C. K. B.; but see *Re Bateman's Estate*, 21 L. J. Ch. 691.

(z) *Ex parte Vicar of Bredirot*, 5 Rail. Ca. 209.

(a) See sect. 74; and *Ex parte Ward*, 2 De G. & S. 4.

(b) *Ex parte Wilkinson*, 3 De G. & S. 633; and see *Re Tinkler*, 19 L. T. 338.

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Where land let on lease.

which he received prior to the sale, and if the dividends are insufficient, the corpus of the fund must make good the deficiency (c). Where land was demised by an ecclesiastical corporation, the Court directed that out of the dividends of the stock arising from the purchase-money, only the amount of the reserved rent should be paid to the corporation during the term, and that the residue of the dividends should be accumulated (d): and, as a general rule, it would seem that a tenant for life is only entitled to such a proportion of the dividends as will compensate for his loss of interest (e). Where, however, part of the consideration for the lease was a contemplated expenditure by the lessee in repairs and improvements, and a lower rent was for this reason reserved, the tenant for life was held entitled to the dividends on the whole fund (f).

Primâ facie right thereto of parties in possession of the land.

Where a Railway Act provided that where any question should arise upon the Act touching the title to any lands, &c., "the parties who should have been in possession or receipt of the rents or profits of such lands at the time of such purchase," &c., "should be deemed to have been lawfully entitled, &c., according to such possession until the contrary should be shown to the satisfaction of the Court," and the capital and income of the funds, &c., representing the purchase-money were to be paid and applied accordingly; it was held that the party in possession, but whose title was objected to by the company, was entitled to have

(c) *Jeffreys* v. *Connor*, 28 Beav. 328; *Re Money*, 2 Dr. & Sm. 94. But see *Re Birch*, 10 Jur. N. S. 673.

(d) *In re Dean and Chapter of Gloucester*, 15 Jur. 239; *Ex parte Jesus College*, V.-C. P., Nov. 1851; *Ex parte Dean of Ch. Ch.*, 23 L. J. Ch. 149.

(e) See *Re Wotton's Estate*, L. R. 1 Eq. 589; *Re Mette's Estate*, L. R. 7 Eq. 72; and these cases have since been followed.

(f) *Re Steward*, 1 Drew 636; and see as to a renewable lease, *Re Beaufoy*, 1 Sm. & G. 20. As to claims for compensation by ecclesiastical bodies in respect to loss of fines on renewal, see *Ex parte Bishop of Winchester*, 10 Ha. 137; *Ex parte Dean and Chapter of St. Paul's*, 1 Kay & J. 538; *Ex parte Dean and Chapter of Westminster*, 18 Jur. 1113; *Ex parte Archbishop of Canterbury*, 2 Eq. R. 728; *Re Dean and Chapter of Westminster*, 26 Beav. 214. For form of order see Seton, 1071.

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the money paid out of Court on his own affidavit of title (g). The 79th section of the Lands Clauses Consolidation Act, 1845, contains provisions of a similar nature; but it has been held that this section was intended only as a direction to the Court how it should act in cases where, upon application for money deposited, it should be unable to arrive at a satisfactory conclusion as to what parties are lawfully entitled to the land (h); it being the object of the Legislature not to disturb the person in possession, unless it is clearly shown that he has no title (i): but where the title is proved to be doubtful, the Court is bound to try the question (k).

What affidavit necessary on petition for payment out of court.

In all petitions under Acts of Parliament for sale of property for public purposes, when the purchase-money is directed by the Act to be paid into Court, the petitioners claiming to be entitled to the corpus of the money so paid in, must, personally, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum mentioned in the petition, or any part thereof (l): and an affidavit to this effect will not be dispensed with, although the petitioner be aged and infirm, and the company have contracted with him, accepted his title, and consented to the prayer of the petition (m): and the affidavit of title is required where the application is merely for the dividends (n); but the party in possession of the land is *primâ*

(g) *Ex parte Grainge, Re Great Western Railway Acts*, 3 Y. & C. 62; and see cases cited, p. 66.

(h) See *Ex parte Freemen of Sunderland*, 1 Drew. 184, 191; 16 Jur. 370, 371. See too, remarks of V.-C. Wood, in *Re St. Pancras Burial Ground*, L. R. 3 Eq. 173, 183.

(i) *Re Perry's Estate*, 1 Jur. N. S. 917.

(k) See *Ex parte Freemen of Sunderland, ubi suprà;* and remarks of V.-C. K. 16 Jur. 371; Rolt's Act, 25 & 26 Vict. c. 42; *Brandon* v. *Brandon*, 2 Dr. & Sm. 305.

(l) Letter of Lord Chancellor to Senior Registrar, dated 12th February, 1842; and see Consol. Orders xxxiv., Morgan, 543, and the new Chancery Rules of December, 1874.

(m) *Ex parte Hollick*, 16 L. J., N. S. Ch. 71.

(n) See *Ex parte Warden of Winchester College*, 14 W. R. 788; overruling *Re Braye*, 9 Hare, App. vii.

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facie entitled to the dividends, although his title be doubtful (*o*). Where a person entitled to an aliquot share of a sum of money so brought into Court petitions for payment of his share, he need not give notice to the parties entitled to the other shares (*p*); nor, where an order has been made for the payment of the interest to a single woman, need the company be served with a petition for its payment to her and her husband on her marriage (*q*). Where trustees had power to sell after the death of A., and the money was paid into Court by reason of the purchase being made in his lifetime, it was upon his decease ordered, with the consent of the company, to be paid to the trustees, without notice to the *cestuis que trust* (*r*); but the company must pay the costs of trustees who have been served, and who appear (*s*).

As to service on incumbrancers.

Upon a petition by a tenant for life for the re-investment of the money paid into Court, it is necessary to serve incumbrancers upon the life estate (*t*): but not parties entitled in remainder (*u*); nor the tenant for life, where the incumbrance only affects his estate (*x*); unless the Court or the company require his appearance (*y*): but in other cases, incumbrancers must be served (*z*); except where the mortgage only affects land not taken by the company (*a*), or has been created since the purchase-money was paid into Court (*b*). In many instances where the owner has been tenant in tail, the purchase-money has been paid out to him without his being required to execute a disentailing

(*o*) *Re Perry's Estate*, 1 Jur. N. S. 917.

(*p*) *In re the Midland Counties R. Co.*, 11 Jur. 1095, R.

(*q*) *Ex parte Hordern*, 2 De G. & S. 263.

(*r*) *Ex parte East*, 22 L. T. 197, V.-C. W.

(*s*) See *Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 48; *Henniker v. Chafy*, 35 Beav. 124.

(*t*) *Ex parte Smith*, 6 Rail. Ca. 150.

(*u*) *Ex parte Staples*, 1 De G. M. & G. 294.

(*x*) *Ex parte Smith*, 6 Rail. Ca. 150.

(*y*) *Re Smith*, 12 W. R. 218; *Re Hungerford*, 1 K. & J. 413; 3 K. & J. 415.

(*z*) See *Ex parte Peyton*, 2 Jur. N. S. 1013; *Re Nash*, 25 L. J. Ch. 29; but see *Re Hadfield*, 29 Beav. 370.

(*a*) *Re Yeates*, 12 Jur. 279.

(*b*) See Morgan, 51.

deed (c); but according to more recent decisions (d) a disentailing assurance is necessary before the fund can be paid out to a tenant in tail. The practice, however, is still unsettled (e); but it seems open to question whether the Court has any power, even where the fund is very small, to dispense with the strict requirements of the statute (f).

If there has been an order for temporary investment, the Judge who made it or his successor should also hear the petition for investment in land (g). In charity cases, it is not necessary to procure the sanction of the Charitable Trust Commissioners to the proposed investment (h).

What mode of re-investment thereof will be sanctioned by court.

The Court has refused to sanction the investment of money, so paid into Court, in the purchase of an equity of redemption (i): and has refused to interfere with the Master's decision who reported generally against the propriety of an investment on mortgage (k). An investment in land of a different tenure from that which produced the fund is generally improper (l): but the rule does not prevent the application of money arising from the sale of freeholds in enfranchising copyholds limited to corresponding uses (m), or in buying up a beneficial lease which forms an incum-

(c) *In re S. E. R. Co.*, 30 Beav. 215; *Sowry* v. *Sowry*, 6 Jur. N. S. 337, where the fund was under 200*l.*; but see *Re Brooking*, *ib.* 441; *Re Watson*, 10 Jur. N. S. 1011; *Nottley* v. *Palmer*, 11 Jur. N. S. 968; L. R. 1 Eq. 241; *Re Holden*, 1 H. & M. 445; *Re Holden's Estate*, 10 Jur. N. S. 308; *Re Row*, L. R. 17 Eq. 300.

(d) See *Re Butler's Will*, L. R. 16 Eq. 479; followed *In re Norcop's Trust* by V.-C. B. 1 August, 1874.

(e) See *Re Row*, *ubi suprà*, and remarks of V.-C. Malins on *re Butler's Will*.

(f) See remarks of the Lords Justices on *re Watson*, 10 Jur. N. S. 1011.

(g) *Re Harman's Estate*, 1 Eq. R. 246.

(h) *Re Lister's Hospital*, 6 De G.M. & G. 184; and see *Re St. Giles' Volunteer Corps*, 25 Beav. 313.

(i) *Ex parte Craven*, 17 L. J., N. S., Ch. 215, V.-C. E.; and see *Ex parte Metherell*, 16 Jur. 72; 20 L. J. 629; where all the necessary directions are embodied in a single order.

(k) *Ex parte Francklyn*, 1 De G. & S. 528; *Barry* v. *Marriott*, 2 De G. & S. 491.

(l) *Ex parte Macaulay*, 23 L. J. Ch. 815, where the Court disapproved of *In re Cann's Estate*, 19 L. J., Ch. 376, V.-C. K. B.; 15 Jur. 3; *In re the Liverpool Dock Acts*, 1 Sim. N. R. 202; and see *Re Brasher's Trusts*, 6 W. R. 406.

(m) *In re Cheshunt College*, 1 Jur. N. S. 995; *Dixon* v. *Jackson*, 4 W. R. 450; 25 L. J. Ch. 588.

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brance on other freeholds settled to the same uses (n); and in a very recent case, where a freehold chapel vested in trustees had been taken under compulsory powers, the Court authorized an investment in the purchase of a leasehold chapel, a suitable freehold tenement not being readily procurable (o). The Court will ordinarily require the title to be approved in the usual way; *viz.*, under the present practice, by the conveyancing counsel of the Court: but the Court is at liberty to adopt any other mode of satisfying itself of the sufficiency of the title (p); and a strictly marketable title will not always be insisted on (q). Where the fund has arisen from land belonging to an ecclesiastical corporation sole, the income has been ordered to be paid to the petitioning incumbent, so long as he remained incumbent, and afterwards to the incumbent *for the time being* (r): so, in the case of a charity, the order has been for payment to any two of the trustees for the time being (s); but no payment of the proceeds of charity lands can be made to the trustees without the consent of the Charity Commissioners (t).

Practice on applications for re-investment.

The following is the present practice upon petitions for investment in land. The petition should be intituled in the matter of the particular will, or settlement, affecting the land and of the Lands Clauses Consolidation Act, and the special Act (u). It should be supported by an affidavit, not only verifying the title of the petitioner, but also stating that he is

(n) *In re Manchester Railway Co.*, 2 Jur. N. S. 31; and see *Ex parte Bishop of London*, 2 De G. F. & J. 14; *Ex parte Corporation of Sheffield*, 21 Beav. 162.

(o) *Re Rehoboth Chapel*, L. R. 19 Eq. 180: sed quære.

(p) *Re Jones*, 1 Jur. N. S. 817; *Ex parte Vicar of East Dereham*, 21 L. J. Ch. 677; and see *Re Hickin's Estate*, 1 W. R. 505. For modern forms of order for re-investment in land, see Seton, 1064.

(q) *Suprà*, p. 89.

(r) *In re the Archbishop of Canterbury*, 2 De G. & S. 365; *vide infrà* as to costs; and see *In re the Buckinghamshire Railways*, 5 Rail. Ca. 702.

(s) *In re Collins' Charity*, 20 L. J. 168, V.-C. K. B.; *Ex parte Shrewsbury Hospital*, 9 Ha. Appx. xlv.; *In re Lucas' Charity*, V.-C. W., 8th March, 1856, *Re Clinton*, 8 W. R. 492, V.-C. W. See as to evidence, *Re Lowndes' Trust*, 20 L. J. 422, V.-C. K. B.

(t) *Re Faversham Charities*, 10 W. R. 291.

(u) Seton, 1076; *Re Clarke*, 10 L. T., N. S. 366.

not aware of any right in any other person, or of any claim made by any other person to the sum mentioned in the petition, or to any part thereof (*x*). There should also be evidence as to the nature and fitness of the proposed investment, which should be supported by the affidavit of a surveyor or other qualified person, stating the value, rental, and outgoings, and other circumstances rendering the proposed investment desirable. If, on the hearing of the petition, the Court is satisfied with the evidence, the investment is approved of at once, and an order is made directing an enquiry, whether a good title can be made; and that if a good title can be made, then upon the execution of the proper assurances a sufficient part of the stock in Court to raise the requisite amount of purchase-money be sold, and the sum so raised be paid to such persons as shall be named in the chief clerk's certificate as entitled to receive the same, and in such proportions as therein mentioned, and that the costs of the petitioners be taxed and paid by the company (*y*). The order having been drawn up, passed, and entered, a copy is left at the chambers of the judge, and a summons to proceed with the inquiries is taken out. An abstract of title is then carried into the judge's chambers, with an affidavit by the solicitor's clerk that he has examined the abstract with the various documents therein abstracted (specifying them), and that the abstract contains a true and faithful abstract, description, or copy of each and every of such documents. The chief clerk thereupon, in ordinary cases, gives a note to the registrar, who fills it up with the name of the conveyancing counsel in rotation (*z*). The abstract, affidavit, contract, &c., are

(*x*) Ord. xxxiv. 3. For form of affidavit, see Daniell, vol. iii. 1983.

(*y*) For forms of orders, see Seton, 1068—1075.

(*z*) The reference to the conveyancing counsel is not, however, imperative: but the Judge may, by a personal examination of the papers, or in any other manner satisfactory to his own mind, assure himself of the sufficiency of the title. See *In re Jones*, 1 Jur. N. S. 817; *Chamberlain v. Chamberlain*, 1 Sm. & G. App. 28. So too, for special reasons, the reference is sometimes not to the counsel in rotation, but to one specially named. When, as not unfrequently happens, parties are anxious to secure a particular property for the purpose of bringing it into settlement, and are not in a position immediately to go to the Court, and they buy it, and accept the title under the opinion of one of the Court counsel, such opinion

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then laid before the conveyancing counsel by the petitioner's solicitor. The counsel having approved of the title (*a*), settles a draft conveyance, which is approved by the judge, by the agency of his chief clerk; unless points of difficulty arise which demand his own personal decision. An ingrossment of the draft is then made, and verified by affidavit; and an affidavit is then made and carried in, that a search has been made for incumbrances, as directed by the counsel, and that none has been found. The chief clerk then gives his certificate that a good title has been shown to the hereditaments, and that an indenture has been settled and approved of by the judge as a proper conveyance of the said hereditaments, and that the purchase-money is payable to specified parties; which indenture is verified by the chief clerk's signature in the margin. The ingrossment is then executed, and an affidavit of the execution filed; upon the production of which, and of the certificate, the money in Court is paid to the persons named in the certificate as entitled thereto.

Where evidence is insufficient.

Where the Court is not in the first instance satisfied with the evidence as to the fitness of the proposed investment, the petition will be allowed to stand over for further evidence, or adjourned generally into chambers; or an inquiry will be directed as to the propriety of the intended purchase, with consequential directions for carrying it into effect if the investment is approved (*b*).

Death of petitioner, when

A reference directed on the petition of an ecclesiastical

is usually, although not invariably, acted upon, if and when the purchase is subsequently adopted by the Court. The same practice prevails in other cases, particularly in those of settlements upon the marriage of infant wards of Court; in respect to which there is frequently a very inconvenient amount of pressure as regards time.

(*a*) As to the mode of verifying such approval, see *Re Caddick's Settlement*, 9 Ha. App. ix.; *Ex parte Rector of South Collingham*, ib. 12. As to the mode of reference, see 15 & 16 Vict. c. 80, ss. 40, 43; Cons. Ord. ii.; Morgan, 383. As to costs where purchaser employs his own private conveyancer in addition to the Court counsel, see *Re Jones' Estate*, 4 Jur. N. S. 887.

(*b*) Daniell, 1134; Seton, 492. As to costs of re-investment, *vide infrà*.

corporation sole, may, notwithstanding his decease, be proceeded with by consent of his successor, without any supplemental order (*c*).

a corporation sole.

A conveyance to a charity, upon a re-investment in land of the purchase-moneys of their sold estate, requires enrolment under the Mortmain Act (*d*).

Conveyance to a charity on re-investment requires enrolment.

Where trustees, with power to sell and convert at request of a tenant for life, join with him in conveying to a railway company, this is a conversion, and the money is personal estate, although the sale was compulsory, and the price was fixed by a jury (*e*); but, in the absence of any conveyance by the trustees in execution of their trust, the sale will be deemed to be effected under the compulsory powers; and the purchase-money will remain impressed with the character of realty (*f*).

Compulsory sales by trustees, under power, a conversion.

Where purchase-money has been paid into Court by a company, by reason of the vendors failing to make a title, and they subsequently make out a title to part only of the land, an order may be made for the apportionment of the fund in Court, and giving consequent directions (*g*).

Apportionment of fund in Court, if title shown to part of land.

The Court has no jurisdiction to give to the landowner interest on the amount which has been paid into Court by the company, as the value of land on the assessment of a jury (*h*).

Interest.

(7.) *As to purchaser's right to deeds, attested copies, &c.*

Section 7.

The purchaser, upon completion, is entitled (subject to the exceptions hereinafter noticed) to all deeds and other muniments of title, however ancient, which are in the possession

As to purchaser's right to deeds, attested copies, &c.

(*c*) *Ex parte the Rector of Lea*, 21 L. J. Ch. 776.

(*d*) See *Ex parte Christ's Hospital*, 12 W. R. 669, V.-C. W.

(*e*) *Re Taylor's Settlement*, 9 Ha. 596.

(*f*) *Ib.*; and see *Re Horner*, 5 De G. & S. 483; *Re Steward*, 1 Sma. & G. 32; *Re Harrop*, 3 Drew., 726.

(*g*) *Re Parks*, 1 Sm. & G. 545.

(*h*) *Re Divers*, 1 Jur. N. S. 995.

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Purchaser's right to delivery of muniments of title.

or power of the vendor (*i*): and it is conceived that the vendor, (unless he retain property held under a common title,) has in general no right to keep copies of any documents other than those which subject him to some future personal liability.

Where he purchases only part of the estate.

Where, however, the purchaser does not buy all the estate, but any portion, however small, remains in the vendor, it has often been discussed, though not judicially decided, whether the vendor or the purchaser ought to have the custody of the deeds. In the last edition of this work, we suggested as the sounder view, that in the absence of any stipulation, the vendor was entitled to retain the deeds on his covenanting to produce them (*k*); and such, under the Vendor and Purchaser Act, 1874, is now the rule on the completion of any contract for sale of land, made since December, 1874.

Where the whole estate is sold to different purchasers

Where the whole estate is sold to different purchasers, the practice (in the absence of agreement), has hitherto been for the purchaser of the portion of largest value (*l*) to take the deeds and covenant for their production; and this practice does not seem to be interfered with by the recent Act. Where there was a condition that the purchaser of "the largest lot" should have the deeds, the purchaser of the largest single lot was held entitled to them in preference to a purchaser of several lots of an aggregate larger extent (*m*).

Vendor having covenanted to produce deeds to other parties not therefore entitled to retain them.

The fact of the vendor having already covenanted for production to a former purchaser, will not, in the opinion of Lord St. Leonards (*n*), justify him in refusing to deliver the deeds, if the second purchaser will allow notice of the

(*i*) Sug. 433; 1 Jarm. Conv. by S. 63; *Austin* v. *Croome*, 1 Car. & M. 653; *Smith* v. *Chichester*, 2 Dru. & W. 393. As to the destruction of the deeds, *vide suprà*, pp. 142, 413.

(*k*) But see Sugd. 434; and *vide infrà*.

(*l*) *Griffiths* v. *Hatchard*, 1 K. & J. 17.

(*m*) *Scott* v. *Jackman*, 21 Beav. 110.

(*n*) Sug. 435.

covenant to appear in or upon his conveyance, and will covenant to perform the prior covenant: this covenant by the second purchaser would, of course, be entered into with the first purchaser, if the vendor's covenant was made determinable upon his procuring, or the first purchaser will accept, such a substituted covenant; or otherwise with the vendor himself, and would then take the shape of a covenant to produce the deeds, &c., and to indemnify him against liability under the former covenant.

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Sale under a settlement.

Where property is sold under a trust for sale in a settlement, which goes on to declare trusts of the purchase-money (whether the same is to continue money or to be re-invested in real estate), it is conceived that the existence of the trusts gives no right to the trustees to retain the settlement, unless they also retain part of the settled estate; but the purchaser must covenant to produce it, even although he buy the entire property. In order to avoid this difficulty, it is usual, where an absolute conversion is intended, to settle the money by a deed distinct from that containing the trust for sale. Possibly the proper rule in cases of several sales under a settlement may be, that, unless the trustees retain part of the estate, it should be deposited, for the benefit of all parties, until performance of the trusts; and then delivered to the largest purchaser upon his entering into covenants for its production: the right to the deed, considered as an instrument creating *terminable* trusts, may, perhaps be considered as governed by a case (*o*) in which, upon the purchase of a part of an estate in lease, the Court thought that the counterpart of the lease ought to be deposited for the benefit of all parties.

Deposit of settlement until completion of trusts.

Of lease on purchase of reversion.

Liability of mortgagee settling several mortgages by one deed.

Where a mortgagee of distinct properties, belonging to distinct mortgagors, transfers the mortgage debts by one deed without their consent, he will have to pay for the necessary attested copies of the deeds which he has thus made common to the several titles, and of the necessary

(*o*) *Shore* v. *Collett*, G. Coop, 234.

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covenants for its production (p): so where he settles the debt in such a manner as to make the settlement part of the title (q).

Purchaser not entitled to deeds used as negative evidence.

And the purchaser, it appears (r), has no right either to the custody, or to a copy, of instruments produced merely as negative evidence to satisfy him that they contain nothing affecting the title (s); nor to any covenant for their production, unless they are in the custody or power of the vendor.

Purchaser's right to attested copies of originals not given up.

If the deeds themselves are not delivered, the purchaser (in the absence of stipulation (t) may require attested copies at the vendor's expense (u); and this right does not seem to be taken away or qualified by the Vendor and Purchaser Act, 1874 (x). It has been observed by Lord Eldon, that purchasers set an undue value upon these copies; that, except as between the parties themselves, they are waste paper upon an ejectment (y). Nevertheless they are, it is conceived, of considerable practical importance, if the property is likely to be re-sold: for the ordinary condition, making them evidence without production of the originals, seldom damps a sale; whereas the absence both of originals and attested copies—supposing the former to have been subsequently lost or destroyed—might cause a serious deficiency in price.

Restriction upon such right.

The right, however, seems to be confined to such documents as are necessary to make out a marketable title (z):

(p) *Capper* v. *Terrington*, 1 Coll. 103; as to the practice of requiring an affidavit of documents from a mortgagee in a foreclosure suit, see *Weeks* v. *Stourton*, 11 Jur. N. S. 278.

(q) *Dobson* v. *Land*, 4 De G. & S. 581; where the question whether the mortgagor could claim to hold the settlement, although waived, seemed to be concluded by the form of the decree. *Qy.* as to the general right in such a case?

(r) *Vide suprà*, pp. 322, 331.

(s) Sug. 436.

(t) As to such a stipulation, see *Cotton* v. *Scudamore*, 1 K. & J. 321; *Boughton* v. *Jewell*, 15 Ves. 176; *Griffiths* v. *Hatchard*, 1 K. & Jo. 17.

(u) *Dare* v. *Tucker*, 6 Ves. 460; *Boughton* v. *Jewell*, 15 Ves. 176; *Berry* v. *Young*, 2 Esp. 640.

(x) 37 & 38 Vict. c. 78, sect. 2.

(y) 6 Ves. 460; see *Doe* v. *Brydges*, 7 Sc. N. R. 339.

(z) *Dare* v. *Tucker*, 6 Ves. 460; *Cooper* v. *Emery*, 1 Phill. 388.

nor does it seem to extend to copies of Court Roll, or deeds enrolled under Statutes which require enrolment (a), or, in Lord St. Leonards' opinion, to "deeds enrolled for safe custody in a Court of Record," or "wills registered and accessible" (b); but the practice in this respect does not appear to be settled (c). If, however, the vendor is in possession of attested copies (d) of enrolled deeds, &c., the purchaser can claim them; unless other property, held by the same title, is retained by the vendor or sold to another purchaser (e).

Purchaser also entitled to covenant for production of originals.

Previously to the 37 & 38 Vict. c. 78, the purchaser, as respects deeds of which he could claim attested copies at the vendor's expense, was also entitled (at the like expense) to a covenant for the production of the originals, and also to a covenant for the production of such copies of Court Roll, and instruments on record, as were in the vendor's possession or power (f): but the expenses of future production were borne by the purchaser (g). But now in the completion of any contract made since December, 1874, subject to any stipulation to the contrary in the contract, such covenants for production as the purchaser can and shall require are to be furnished at his expense, and the vendor is only to bear his own costs of perusal and execution (h).

In a case of sale in lots under order of the Court, where the purchasers had notice that the deeds would be delivered to the largest purchaser, who would enter into the usual covenants for production, it was held that, in the absence of any stipulation, each purchaser must bear the expense of his own deed of covenant (i).

(a) See *Cooper* v. *Emery*, *ubi suprà*; *Campbell* v. *Campbell*, Sug. 449.
(b) See Sug. 448.
(c) 9 Jarm. Conv. by S. 10.
(d) *Suprà*, p. 408.
(e) Sug. 448.
(f) *Berry* v. *Young*, 2 Esp. 640, n.; *Cooper* v. *Emery*, 1 Phill. 388.
(g) *Berry* v. *Young*, 2 Esp. 640, n.
(h) 37 & 38 Vict. c. 78, sect. 2, rule 4.
(i) *Strong* v. *Strong*, 4 Jur. N. S. 943.

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Mortgagee holding deeds as owner of other land.

A mortgagee concurring in the sale, and retaining the deeds in respect of property of large value held by him as owner under the same title, would *primâ facie* be bound to covenant for their production (*k*).

Where the title deeds are retained by the vendor on his covenanting to produce them, it is prudent to require notice of the covenant to be endorsed on the deeds covenanted to be produced: but, in the absence of agreement, the purchaser, it is conceived, could not insist on such an indorsement.

Absence of copies of Court Roll and deeds where production cannot be enforced should be explained.

And it must be remembered, that although the purchaser cannot require the production of original copies of Court Roll, or enrolled deeds, &c., if not in the possession or power of the vendor, he yet may, and should in all ordinary cases, inquire into the reason of their non-production; that is, if their date and character warrant the supposition that they may be denied with an improper motive: for in the well-known case of *Whitbread* v. *Jordan* (*l*), the omission of a mortgagee to make inquiry on the subject was, under the particular circumstances, attributed to wilful blindness (*m*): and this doctrine has been recognised in later decisions (*n*).

Whitbread v. Jordan.

Section 8.

Registration, enrolment, &c.

(8.) *As to matters necessary to insure the full effect of the executed conveyance.—Registration, enrolment, &c.*

Conveyance should be entered in local register (if any).

If the property be subject to the operation of any of the local Registration Acts, a memorial of the conveyance should be registered as soon as practicable after execution; the register having (as before observed) been searched as closely as possible before completion. When dealing with respectable parties this rule as to immediate registration is often

(*k*) See *Yates* v. *Plumbe*, 2 Sm. & G. 174.

(*l*) 1 Y. & C. 303.

(*m*) 1 Phill. 255; and see a note on the subject in 4 Y. & C. 564.

(*n*) *Worthington* v. *Morgan*, 16 Sim. 547; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652; *et vide infrà*, Ch. XV. s. 5; Sug. V. & P. 767.

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Importance of immediate registration.

not very strictly attended to; but any departure from it is at the peril of the solicitor. By delay the purchaser is exposed to the risk not only of a subsequent fraudulent sale or mortgage by the vendor, (which may generally be considered merely nominal,) but also of prior unregistered incumbrancers (*o*), whose claims may perhaps be unknown even to the vendor, acquiring priority by registration between the execution and the registration of the conveyance.

As to registration of an equitable charge.

In *Sumton* v. *Cooper* (*p*), the Court of King's Bench held what appears to be sufficiently evident, *viz.*, that the local Registry Acts do not apply to the case of a mere equitable mortgage by deposit of deeds unaccompanied by any memorandum. And in *Wright* v. *Stanfield* (*q*) it was held by Lord Romilly that a memorandum of equitable charge on land in Middlesex, consisting merely in an undertaking to execute a legal mortgage, and containing no words of present charge, did not require registration: in a later case (*r*), the same learned Judge postponed an unregistered equitable memorandum of present charge to a subsequent registered mortgage; and distinguished the case before him from that of *Wright* v. *Stanfield*. In a later case (*s*), where the previous authorities were cited, it was distinctly laid down that a memorandum of equitable charge is a document requiring registration under the 9 Anne, and the distinction which was acted on by Lord Romilly was treated as unsatisfactory; and in a still more recent case (*t*), an unregistered memorandum of equitable charge was postponed to a subsequent registered mortgage; and it seems to be now well settled that every instrument which transfers an interest in, or creates a charge on, land, is a "conveyance" within the meaning of the Registry Acts. Thus, it has been held that a further charge in favour of a mortgagee, whose prior security is registered, is a convey-

(*o*) As in *Martinez* v. *Cooper*, 2 Russ. 198.

(*p*) 2 B. & Ad. 226.

(*q*) 27 Beav. 8.

(*r*) *Moore* v. *Culverhouse*, 27 Beav. 639.

(*s*) *Nere* v. *Pennell*, 2 H. & M. 170, 186.

(*t*) *Re Wright's*, mortgage trust, L. R. 16 Eq. 41.

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ance requiring registration, and that if unregistered it will be postponed to a subsequent registered incumbrance, taken without notice of the further charge (*u*).

As to priority between deeds registered at the same time.

Where two deeds are registered on the same day, and at the same hour, the memorial which is denoted by the earlier number will, in the absence of direct evidence to the contrary, be presumed to have been first registered (*x*).

What interests are excepted from Registration Acts.

The exceptions in the Acts are of copyhold estates, leases at a rack-rent, and leases not exceeding twenty-one years where the actual possession and occupation go along with the lease.

Copyholds.

The exception of copyholds is not considered in practice to extend to such leases as would require registration if the estate were freehold (*y*); and the registration of all such deeds affecting this description of property, as are not usually recorded by the steward of the manor, has been recommended (*z*).

Leases at rack-rent—to what the exception of extends.

The exception of the greatest practical importance is that of leases at rack-rent: Lord St. Leonards considers it to be the better opinion that the assignment of a lease, held at what was originally a rack-rent, need not be registered in respect of its having become a valuable property: perhaps, however, this is a doctrine which should be cautiously received in practice (*a*). A lease which contains any *engagement* on the part of the lessee to build upon, or otherwise improve, the property, cannot, it is conceived, be considered as a lease at a rack-rent within the meaning of the exception; although the rent may be reserved from the date of the lease, and may exceed what would be the annual value of the property if let for any other purpose.

Whether to building or repairing leases.

(*u*) *Credland* v. *Potter*, L. R. 10 Ch. Ap. 8; affirming V. C. B. L. R. 18 Eq. 350.

(*x*) *Neve* v. *Pennell*, *ubi suprà.*

(*y*) Sug. 732.

(*z*) Rigge on Registration, 88, n.

(*a*) Rigge, *ubi suprà.*

Of the third exception it need only be observed, that the words "possession and occupation" are in the conjunctive (b): so that, in order to avoid registration the purchaser must not only buy the present interest in the lease but must actually become the occupier of the premises.

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Leases for twenty-one years, or under.

The Middlesex Act has no operation within the City of London (c).

London not affected by Registration Act.

It appears, that a deed assigning a legacy or other sum of money charged upon land, but not purporting to deal with the land itself, does not require registration (d); but registration is not rendered unnecessary by the circumstance of the conveyance operating as an appointment pursuant to a power in a registered instrument (e).

As to registration of assignment of money charged on land.

Of deed of appointment.

Conveyances of lands taken under the provisions of the Lands Clauses Consolidation Act, 1845, are, it is believed, in practice registered in the local registers, in the same way as ordinary purchase-deeds; and this seems to be the proper course.

Of railway conveyances, &c.

By the 16 & 17 Vict. c. 56, s. 6, any deed affecting crown lands in England or Wales to which the Commissioners of Woods and Forests are parties, and which has been enrolled in the office of Land Revenue Records and Enrolments, does not require registration in the local Registry.

Of conveyances by Commissioners of Woods and Forests.

The local registries no longer apply to land which has been registered under the Indefeasible Title and Registry Act (f), so long as it continues so registered.

Local registry superseded where title registered under Land Registry Act.

(b) Rigge, *ubi suprà*; see *Fury* v. *Smith*, 1 Hud. & B. 735; 751.

(c) Sug. 732.

(d) *Malcolm* v. *Charlesworth*, 1 Keen, 63; see p. 73. But an assignment of a contract for a mortgage has been held to be within the Irish Act; *Gardiner* v. *Blesinton*, 1 Ir. C. R. 64, 79; and see *Bushell* v. *Bushell*, 1 Sch. & L. 90; and *Drew* v. *Lord Norbury*, 3 J. & L. 303, as to the registration of mere equitable contracts in Ireland; and *vide suprà*, p. 679, as to registration of equitable charges.

(e) *Scrafton* v. *Quincey*, 2 Ves. S. 413.

(f) 25 & 26 Vict. c. 53, s. 104.

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Of will.

Upon purchasing from a devisee the purchaser should ascertain that the will has been registered, or procure the omission to be supplied. Prior to the 37 & 38 Vict. c. 78, it was generally considered that where the will had not been, or could not be, registered within the period allowed by the Act, a good title could not be made without the concurrence of the heir (g). In a case under the East Riding Registry Act, it was held that a will, which was not discovered until the expiration of six calendar months from the testator's death, and where, in consequence, there had been no registration of the will, or of the impediment preventing registration, was void as against registered purchasers and mortgagees from the testator's heir (h). The East Riding Registry Act (6 Anne, c. 35, s. 15) is the only one which requires a memorial to be registered of the impediment to the registration of the will. The Middlesex Act (7 Anne, c. 20) and the North Riding Act (8 Geo. II., c 6) both provide that the titles of purchasers and mortgagees shall not, in case of concealment or suppression of the will, be disturbed after the expiration of five years in the case of lands in Middlesex, and of three years in the case of lands in the North Riding.

Where will not registered within the prescribed period.

On a proposal to invest part of the funds in Court under Carew's Estate Act, 1867, the author, advising on the title, brought this point under Lord Romilly's consideration, and his lordship wrote as follows:—"I am of opinion, that in the present state of the authorities on this subject, and having regard to the very distinct expression contained in the Registry Act for Middlesex, it is not safe to lend money on a title derived from the devisees of lands in Middlesex under a will not registered within the space of six calendar months after the death of a testator who died in Great Britain, and also that this investment cannot be sanctioned by the Court."

(g) See an article in 14 Jur. pt. 2, p. 267.

(h) *Chadwick* v. *Turner*, 34 Beav. 634; affd. L. R. 1 Ch. App. 310.

The practical inconvenience of this doctrine was very great—registration of a will within the statutory period being the exception rather than the rule—and doubtless led to the 37 & 38 Vict. c. 78, sect. 8, which provides that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him, shall, if registered before, take precedence of and prevail over, any assurance from the testator's heir-at-law.

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It is not quite clear whether this section has given a retrospective validity, as against the heir, to a previously registered assurance by the devisee under a will not registered within the statutory period; and in the investigation of the title, prior to the Act, of land in Yorkshire or Middlesex, it will still be a wise precaution, if not absolutely necessary, to ascertain whether the will under which the title is derived was registered within the time allowed by law, and if not, whether the omission has been effectively cured. If the heir has concurred, or, which is the same thing, if the devisee was himself the heir, the title would appear to be marketable, although the will was not registered within the statutory period: so, also, if the statutory period of non-claim has elapsed since the death of the testator: so, also, if the sale be of a leasehold estate by an executor or legatee: the presumption in every case being against the existence of suppressed documents: but it seems to be going too far to say with Lord St. Leonards (*i*) that, in these cases, registration of the will is *immaterial*: it may be unnecessary as regards the possibility of any subsequent alienation by the heir, devisee, executor, or legatee (as the case may be): but it would seem to be of some importance with a view to the possible existence of unregistered assurances by the deceased owner; which assurances could only, it is conceived, be displaced by a registered assurance from a person

Title marketable if heir concur.

(*i*) Sug. V. & P. 676, 11th edit.

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claiming under a duly registered will; or, possibly, by a registered assurance from the heir, in case of intestacy.

* * *

Memorial—its contents.

A statement of the contents of the memorial which are required by the Legislature, is given in Lord St. Leonards' work (*k*). In recent practice, however, a somewhat fuller statement of the contents and effect of the deed is required at the registration offices, where forms are supplied for the guidance of the public. The registrars, it appears, may be required to registrar a *lithographed* memorial (*l*).

Attestation of.

The memorial itself may be executed (*m*) either by the vendor or purchaser, or either of their heirs, executors, administrators, guardians, or trustees: but one of the two attesting witnesses to the memorial should be a witness who attested the execution of the deed by (it has been said) a *granting* party (*n*). Where the attesting witnesses are dead, re-execution of the deed in the presence of a witness for the purpose of registration is useless (*o*).

Where deed operates as a conveyance of several shares or estates.

And it may perhaps deserve consideration whether the above doctrine, (which was first advanced by Lord St. Leonards,) does not admit of extension. His observation, (which gave rise to the decision in *Essex* v. *Baugh* (*p*),) is as follows, "One of the witnesses" (*i.e.* to the memorial) "must be a witness to the execution of the deed (*q*); and this must be understood to mean, not merely the execution by an unnecessary party, as the grantee, but the execution by the

(*k*) Page 730, 14th edit; and see *Reg.* v. *Middlesex Registrars*, 15 Q. B. 976, where the memorial was held insufficient: and as to Ireland, see *Gardiner* v. *Blesinton*, 1 Ir. Ch. R. 79. The stamp under the late Act is reduced to 2*s.* 6*d.*

(*l*) *Ex parte Ivemey*, 9 Jur. 371, Q. B.; *Reg.* v. *The Middlesex Registrars*, 7 Q. B. 156.

(*m*) The seal of a corporation aggregate would seem to be sufficient: see *Doe* v. *Hogg*, 1 Bos. & P. N. R. 306.

(*n*) It was so decided in *Jack* v. *Armstrong*, 1 Hud. & B. 727, 732; but see 9 Jarm. Conv. by S. 683, contending that it is sufficient if the witness attested the execution of the deed by *either party*; and see Sug. 730.

(*o*) *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(*p*) *Ubi suprà*; see now Sug. 730.

(*q*) In the North Riding Registry Act, this provision is omitted, apparently by mistake.

party from whom the estate moves." Now where the estate is conveyed by several owners, say A., B., and C., each seised of an undivided share, and whose execution of the conveyance is attested by different witnesses, a memorial, attested only by the witness who attested A.'s execution of the deed, is evidently not attested by any witness to the execution of the deed considered as a conveyance of the shares of B. and C., such shares possibly constituting the bulk of the estate. This will, perhaps, appear more obvious if we suppose a purchaser to take by a single deed a conveyance of several distinct estates from several owners. It would seem to be prudent in all such cases to have the memorial attested by a witness or witnesses to the execution of the deed by all the several owners (r).

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Registration under Bedford Level Act.

As respects lands situate in the Bedford Level, it appears that conveyances omitted to be registered under the Bedford Level Act (s) are nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the Act on the owners of lands within the Level, and for the other purposes of the Act (t).

Conveyance to charity trustee, as apparent beneficial owner, must be enrolled under Mortmain Act.

Where a conveyance was made to a purchaser apparently as the beneficial owner, but the purchase-money was in fact part of a charitable fund, and the nominal purchaser, by a subsequent deed, in execution of a power reserved by the conveyance, settled the property in favour of the charity, it was held that both the conveyance and the subsequent settlement required to be enrolled in Chancery under the Statute of Charitable Uses (u).

(r) But see 9 Jarm. Conv. by S. 683.

(s) 15 Car. II. c. 17.

(t) *Willis* v. *Brown*, 10 Sim. 127.

(u) 9 Geo. II. c. 36; *Att.-Gen.* v. *Gardner*, 2 De G. & S. 102; *Att.-Gen.* v. *Munro*, 2 De G. & S. 122: *quære*, as to the effect on the deed of the death of any subscriber within twelve months after its execution? See *Price* v. *Hathaway*, 6 Madd. 304; 2 De G. & S. 116; and, as to the attestation, *Doe* v. *Monro*, 12 Mee. & W. 845. As to the effect of non-enrolment, see *Att.-Gen.* v. *Ward*, 6 Ha. 477, 482. As to the effect of the witnesses not signing the attestation clause, though present at the sealing and delivery of

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Registration of Indian assurances.

By the Indian Registration Act, 1864, every deed of gift of immoveable property was to be registered within twelve months from its date; and a deed not so registered was made inadmissible in evidence. This enactment was repealed by the Indian Registration Act, 1866, which provides that no instrument of gift of immoveable property shall, unless registered, affect any property comprised therein; and the time for registration is limited to four months, extendible, in cases of unavoidable delay, to eight months from the date of execution. In a very recent case, where A., being resident in Madras, in 1865, conveyed land in India to B. by an unregistered deed, in which he covenanted for further assurance, and afterwards by a deed registered under the Act of 1866, mortgaged the same land to C., who had notice of the conveyance to B., a bill by B. against C. to enforce the covenant was dismissed (*x*).

As to enrolment of assurances omitted to be enrolled under Mortmain Act.

By the 24 & 25 Vict. c. 9, certain assurances, notwithstanding non-compliance with the requirements of the 9 Geo. II. c. 36, as to enrolment, were made valid, if enrolled within twelve months after the passing of the Act; and the provisions of this Statute have been recently extended (*y*). Under the 29 & 30 Vict. c. 57, any trustee, governor, director, or manager of a charity may, on application by summons, obtain from the Court of Chancery an order authorizing the enrolment of a deed conveying or charging land for charitable uses; but he must satisfy the Court that the deed was *bonâ fide*, and for full value, and that the omission to enrol it has arisen from ignorance, inadvertence, or accident (*z*).

the deed, see *Wickham* v. *Marquis of Bath*, L. R. 1 Eq. 17. As to whether a power to *devise* land to a charity can be implied from the fact of the charity being by special Act empowered to *hold* land taken by devise, see *Perring* v. *Trail*, L. R. 18 Eq. 88; and compare *Robinson* v. *Governors of London Hospital*, 10 Hare, 19, a far stronger case.

(*x*) *Hicks* v. *Powell*, L. R. 4 Ch. Ap. 741, affirming V.-C. Giffard.

(*y*) See 25 Vict. c. 17; 27 Vict. c. 13; 29 & 30 Vict. c. 57; and see now The Charitable Trustees Incorporation Act, 1872 (35 & 36 Vict. c. 24), which enables the Charity Commissioners to grant a certificate of registration to trustees of a charity; but does not dispense with the necessity of compliance with the provisions of the Mortmain Act.

(*z*) The application is by summons: see Daniell's Chancery Forms, 1938.

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On sale of land already in mortmain to a charity.

Assurances to a charity of land already in mortmain do not seem to require enrolment (*a*): but a conveyance upon a reinvestment of the proceeds of the sale of charity lands compulsorily taken must be enrolled (*b*). A deed duly enrolled takes effect from the date of its execution (*c*).

Religious, &c. Buildings (Sites) Act, 1868.

By a modern Statute (*d*), all conveyances or other dispositions, except by will, *bonâ fide* made after the passing of the Act to a trustee or trustees on behalf of any society or body of persons associated together for religious purposes, or for the promotion of education, arts, literature, or other like purposes, of land for the erection of a building for such purposes, or whereon a building used, or to be used for such purposes, shall have been erected, are exempted from the provisions of the Mortmain Acts; but the piece of land must not, in any case, exceed two acres in area or extent (*e*). And by the same Act, acknowledgment of the deed, with a view to enrolment, is rendered unnecessary.

Enrolment on alienation of lands within Duchy of Cornwall.

By the provisions of the Duchy of Cornwall Management Act, 1863, every deed or instrument whereby any hereditaments forming parts of the Duchy are sold, leased, or disposed of, under the Act, must be enrolled in the office of the Duchy within six months from its date (*f*).

On sale by tenant in tail —disentailing deed to be enrolled.

Where the vendor is tenant in tail, it is essential to the validity of the deed, as against the issue in tail and remaindermen, that it should be enrolled in Chancery within six calendar months after its execution by the vendor (*g*): but, if so enrolled, it takes effect from the time of execution (*h*): except as against persons claiming for valuable

(*a*) *Att.-Gen.* v. *Glyn*, 12 Sim. 84; *Walker* v. *Richardson*, 2 Mee. & W. 882; *Ashton* v. *Jones*, 28 Beav. 460.

(*b*) See *Ex parte Christ's Hospital*, 12 W. R. 669, V.-C. W.

(*c*) *Trye* v. *Corporation of Gloucester*, 14 Beav. 173.

(*d*) 31 & 32 Vict. c. 44.

(*e*) Sect. 1; and see the provisions of the Literary and Scientific Institutions Act, 1854, 17 & 18 Vict. c. 112.

(*f*) See 26 & 27 Vict. c. 49. See this Act as to the alienation of lands forming parts of the Duchy.

(*g*) 3 & 4 Will. IV. c. 74, s. 41.

(*h*) *Cattell* v. *Corrall*, 4 Y. & C. 228.

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consideration under a prior enrolled deed (although subsequently executed) and without express notice of the voidable estate created by the prior assurance (*i*). The enrolment may be made by either vendor or purchaser.

Consent of protector.

If there be a protector of the settlement, and his consent to the assurance be given by a separate deed, the consent-deed must be executed on or before the day on which the assurance is made by the tenant in tail; and must be enrolled in Chancery either at or before the time when the assurance is so enrolled (*k*). Where a married woman is protector in right of her separate estate, she can, without her husband's concurrence, consent to an absolute disposition by the tenant in tail (*l*). Where the tenant in tail in possession is a lunatic, the Lord Chancellor has a discretionary power under the Act to consent to the first tenant in tail in remainder barring the entail (*m*).

When a married woman.

When a lunatic.

Entries and enrolments on sale by legal or equitable tenant in tail, of copyholds.

A legal tenant in tail of lands held by copy of Court Roll may bar the entail by surrender: and an equitable tenant in tail may bar the entail either by surrender or by deed (*n*). If the assurance be by deed, the same must be entered on the Court Rolls of the manor (*o*); and, notwithstanding some ambiguity in the frame of the Act, it is now clearly settled that a deed barring an estate tail in copyholds must be

(*i*) See sects. 38 and 74.

(*k*) 3 & 4 Will. IV. c. 74, ss. 42 and 46.

(*l*) *Keer* v. *Brown*, Johns. 138. A bare trustee, who, under the 31st section of the Fines and Recoveries Act, is protector, can insist on retaining the legal estate only so long as the purposes of the trust exist; thus, where there was a devise to trustees upon trust for a married woman for life for her separate use, with remainder to the use of her children as tenants in common in tail, it was held that the tenant for life having become *discoverte* could compel a conveyance; *Buttanshaw* v. *Martin*, Johns. 89.

(*m*) See *Re Blewitt*, 6 De G. M. & G. 187, overruling a decision of Lord Brougham in the same case; see 3 My. & Ke. 250; and also a decision of Lord Cottenham, *Re Wood*, 3 My. & Cr. 266. See also as to the powers of the L. C. as protector, *Grant* v. *Yea*, 3 My. & Ke. 245; *Re Starkie*, *ib.* 248; and where the protector under the settlement has been convicted of treason or felony, *Re Wainewright*, 1 Phill. 258.

(*n*) Sect. 50.

(*o*) See sect. 53.

entered on the Rolls of the manor within six calendar months after its execution (*p*); an understanding to the contrary was extensively acted on in practice for many years after the passing of the Act, and constitutes a frequent source of danger in copyhold titles. The consent of the protector (if any) may be given by deed, (whether the estate be legal or equitable,) or personally to the person taking the surrender (in those cases where the tenant in tail surrenders) (*q*).

Where tenant in tail is a bankrupt.

An order might be made by the Court of Bankruptcy under the Act of 1861, for vesting the copyholds of a bankrupt in such person and in such manner as the Court should see fit, so as to save the expense of two assurances (*r*). And, under the Act of 1869, where any portion of the bankrupt's estate consists of copyhold or customary property, or any like property passing by surrender or admittance or in any similar manner, the trustee is not to be compellable to be admitted, but may deal with such property in the same manner as if it had been capable of being, and had been in fact, duly surrendered to such uses as the trustee may appoint; and an appointee of the trustee is to be admitted or otherwise invested with the property accordingly (*s*). And, by a later section, the trustee may deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same; the provisions of the Fines and Recoveries Act being expressly extended to proceedings in bankruptcy (*t*).

Consent of protector to barring entail in copyholds.

If the tenant in tail convey by surrender, and the protector consent by deed, such deed must be executed and produced to the Lord of the Manor, his steward or steward's deputy, at or previous to the surrender; and he is to endorse thereon an

(*p*) *Honywood* v. *Forster*, 30 Beav. 1; *Gibbons* v. *Snape*, 1 De G. J. & S. 621; 32 Beav. 130. An indorsement by the steward on the disentailing assurance is not sufficient; *Boyd* v. *Pawle*, 14 W. R. 1009.

(*q*) See sects. 51, 52.

(*r*) 24 & 25 Vict. c. 134, s. 114.

(*s*) 32 & 33 Vict. c. 71, s. 22.

(*t*) *Ib.* sect. 25.

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acknowledgment (which is made *primâ facie* evidence of the fact) of the deed having been so produced; and is to enter the deed and indorsement on the Court Rolls: and then to indorse a memorandum of such entry upon the deed (*u*).

Where consent of protector not given by deed.

If the consent of the protector be not given by deed, it must be given to the person taking the surrender by the tenant in tail: and evidence of such consent is to be preserved on the Court Rolls, in manner provided in the 52nd section of the Act.

Must be by deed, if equitable tenant in tail disentailed by deed.

Where the equitable tenant in tail himself assures by deed, the consent of the protector must be given by deed; and if given by a deed distinct from the principal assurance, such deed must be executed on or before the day of the execution of such assurance by the tenant in tail, and must be entered on the Court Rolls (*x*): and an assurance by deed, by an equitable tenant in tail, is to be void against any person claiming for valuable consideration under any subsequent assurance,—(which would include a surrender,)—duly entered on the Court Rolls before the entry thereon of such deed of assurance (*y*).

Entail in land tax.

An entail in fee farm rents in the nature of land tax may be barred by deed acknowledged and enrolled or registered in manner directed by the 42 Geo. III. c. 116 (*z*).

Acknowledgment by married women.

We have already referred (*a*) to the necessity for the acknowledgment of conveyances by married women: and

(*u*) Sect. 51.

(*x*) The Act does not say that the deed of consent must be entered on the Court Rolls at or before the time when the principal assurance is so entered; but such, it is conceived, is the intention, and it would be prudent so to enter it. The 53rd section of the Act does not seem to apply to customary freeholds; *Reg.* v. *Lord of the Manor of Ingleton*, 8 Dowl. P. C. 693; and see *Carlisle* v. *Towns*, 2 B. & Ad. 585.

(*y*) Sect. 53. Lord St. Leonards considers it probable that notice would not be held in Equity to supply the want of entry on the Court Rolls; V. & P. 471.

(*z*) Sect. 157; and see 38 Geo. III. c. 60, s. 40.

(*a*) *Suprà*, p. 570, *et seq.*

to the extended power conferred upon them by a modern Statute (*b*). Chap. XIII. Sect. 8.

Statutory provisions for immediate entry on court rolls of copyhold assurances.

By the 89th section of the 4 & 5 Vict. c. 35, it is enacted "that after the 31st day of December, 1841, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and also every will and codicil a copy of which respectively shall be delivered to the lord of the manor of which the lands affected by such surrender, deed of surrender, will and codicil, are parcel, or to his steward, or the deputy of such steward, either at any Court holden for such manor at which there shall not be any homage assembled, or out of Court, and also every grant and admission by the lord of any manor, or his steward, or the deputy of such steward, pursuant to this Act, shall be forthwith entered on the Court Rolls of the manor by such lord, or steward, or deputy; and every entry made on the Court Rolls of any manor pursuant to this present clause shall for all purposes whatsoever be deemed and taken to be an entry made in pursuance of a presentment made at a Court holden for such manor by the homage assembled thereat; and the steward, or his deputy, shall be entitled to the same fees and other charges for making such entry on the Court Rolls as he would have been entitled to in respect of such entry, in case the same had been made in pursuance of a presentment made at a Court holden for such manor by the homage assembled thereat."

Conveyance of contingent interest in copyholds under late Act.

The 6th section of the 8 & 9 Vict. c. 106, appears to extend to contingent interests in copyholds (which previously to the passing of that Act were incapable of alienation except by way of contract in Equity) (*c*); and it is of course desirable, although not essential, that the deed of disposition should be entered upon the Court Rolls.

(*b*) 8 & 9 Vict. c. 106, *suprà*, p. 580; and see 20 & 21 Vict. c. 57, as to the disposition of married women of their reversionary interests in personal estate.

(*c*) Scriven on Copyholds, 5th ed., 279 (n). As to the purchaser's power of compelling admittance by *mandamus*, see *ibid.* 380 *et seq.*; admittance may now be granted out of Court, and out of the manor, 4 & 5 Vict. c. 35, s. 88.

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Assurance of copyholds taken under the Lands Clauses Consolidation Act, 1845, to be entered on court rolls.

Where lands of copyhold or customary tenure are taken under the Lands Clauses Consolidation Act, 1845, the conveyance is to be entered by the steward of the manor upon the Court Rolls; and, upon payment to him of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is bound to make such enrolment; and the conveyance, when so enrolled, is to have the effect in respect of such lands as if the same were of freehold tenure (*d*); but until the same are enfranchised (*e*), they are to continue subject to the accustomed fines, rents, heriots, and services. It has been held that, under this provision, the steward cannot claim the fee which would be due to him on the *admittance* of a purchaser (*f*).

Expediency (if land not in register county) of indorsing notice of conveyance on leading title deed if remaining with vendor.

Where the estate is not situate in a register county, and the title deeds are retained by the vendor, it is prudent for the purchaser to procure the indorsement of the conveyance upon the leading document of title; that is, upon the document which the vendor would have to produce in proof of his title were he to attempt to make any disposition of the estate inconsistent with the rights of the purchaser. The doing so has been referred to judicially as being merely an ordinary and proper precaution (*g*); but it has not yet been decided, nor is it commonly considered, that a purchaser has any right, independently of agreement, to insist upon such an indorsement.

Form of notice.

Such a memorandum need only specify the date of, and parties to, the conveyance; and particularize the property therein comprised. It is, of course, important to the vendor, that this should be expressed in definite terms; for, if the memorandum were so worded as to leave any doubt as to the precise amount of property comprised in the conveyance, the production of such conveyance would be necessary upon any future dealing with the residue of the estate.

(*d*) Sect. 95.

(*e*) See sects. 95 and 96.

(*f*) *Cooper* v. *Norfolk R. Co.*, 3 Exch. 546; 6 Rail. Ca. 94.

(*g*) See *Keates* v. *Lyon*, L. R. 4 Ch. Ap. 218, 226.

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Propriety of giving notice to trustees on purchase of equitable interest.

And, as we have already seen, upon the completion of the purchase of an equitable interest in real estate, it is prudent to give notice of the transaction to the owners of the legal estate: but, as a general rule, a purchaser's priority is not affected by his giving, or omitting to give, such notice (*h*). However, upon the purchase of an equity of redemption, such a notice should always be given to the mortgagee, and an inquiry made of him as to the amount due to him, and whether he is entitled to any other charges created by the same mortgagor; for, except so far as his right to tack is taken away by the 7th section of the Vendor and Purchaser Act, 1874 (*i*), any further advances which he may make to the mortgagor upon the security of the equity of redemption, in ignorance of the sale, will be valid as against the purchaser (*k*): and whatever may be the precise effect of this section as respects the right of tacking, it seems quite clear that it does not take away or affect the equitable right of the mortgagee to consolidate all mortgages from the same mortgagor existing at the date of the sale, and which then are, or subsequently become vested in him (*l*).

Importance of notice to mortgagee on purchase of equity of redemption.

Admittance to copyholds.

If the estate be copyhold, admittance is essential in order to perfect the legal title. Before admittance, the surrenderee has, at Law, no assignable interest (*m*): although the rule is of course different in Equity (*n*): and even if the assignee actually himself procure admittance, this will not vest in him the legal estate (*o*).

(*h*) *Suprà*, p. 451.

(*i*) 37 & 38 Vict. c. 78. The section will probably be repealed.

(*k*) *Goddard* v. *Complin*, 1 Ch. Ca. 119; *Blackston* v. *Moreland*, 2 Ch. Ca. 20; *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr. 609, pl. 7; and see *Vint* v. *Padgett*, 2 De G. & Jo. 611; and *infrà*, Ch. XV. s. 6.

(*l*) See and consider *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Loveday* v. *Chapman*, V.-C. Hall, 15 March, 1875; and *vide infrà*, Ch. XV. sect. 6, where this subject is more fully considered.

(*m*) *Matthew* v. *Osborne*, 13 C.B. 938.

(*n*) *Wainewright* v. *Elwell*, 1 Madd. 632.

(*o*) *Matthew* v. *Osborne*, *ubi sup.* Under the late Wills Act, copyholds and customary freeholds are devisable, notwithstanding that the testator may not have surrendered them to the use of his will, or have been admitted thereto; and the Act overrides any custom negativing the right to devise, and the want of any custom to devise; 1 Vict. c. 26, s. 3.

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(9.) *As to the stamps.*

As to the stamps.

Stamps; deed not evidence without.

It is also necessary that the conveyance should be duly stamped; the want of a proper stamp does not, however, affect its validity, but merely renders it inadmissible in evidence (*p*): except in criminal proceedings (*q*); or for some collateral purpose, as *e.g.*, to prove fraud (*r*), or an act of bankruptcy (*s*) consisting in the execution of the deed itself.

What is a conveyance on sale for the purposes of the Act.

For the purposes of the late Stamp Act (*t*), the term, "conveyance on sale," includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser, or according to his direction (*u*).

Deed may be stamped after execution—penalty.

A deed not stamped, or insufficiently stamped, at the time of execution, might, formerly, be stamped at any subsequent period upon payment of the duty and a penalty (*x*); and, if brought to be stamped within twelve months after execution, the commissioners were empowered to remit all or any part of the penalty (*y*): but after the expiration of that time they had no such discretion (*z*). Under the 33 & 34 Vict. c. 97 (*a*), adopting a similar provision in the 13 & 14 Vict. c. 97 (*b*), any unstamped or insufficiently stamped instrument, may be stamped after execution on payment of a penalty of 10*l*. and the unpaid duty; and if such duty exceed 10*l*., then, by way of further penalty,

(*p*) *Robinson* v. *Macdonnell*, 5 Mau. & S. 228, 234; *Duck* v. *Braddyll*, 13 Pri. 455, 469; Tilsley on Stamps, 1st edit. 308; see *Browne* v. *Savage*, 4 Drew. 635; 5 Jur. N. S. 1020.

(*q*) 17 & 18 Vict. c. 83, s. 18.

(*r*) *Holmes* v. *Sexsmith*, 21 L. J. N. S. Exch. 312; 7 Exch. 802.

(*s*) *Ex parte Squire*, L. R. 4 Ch. Ap. 47; *Ex parte Wensley*, 1 De G. Jo. & S. 273; *Ponsford* v. *Walton*, L. R. 3 C. P. 167.

(*t*) 33 & 34 Vict. c. 97.

(*u*) Sect. 70.

(*x*) 37 Geo. III. c. 136, s. 2; *Rex* v. *Preston, Inhab. of*, 5 B. & Ad. 1028

(*y*) 44 Geo. III. c. 98, s. 24.

(*z*) Tilsley, 304.

(*a*) Sect. 15.

(*b*) Sect. 12. These provisions do not seem to apply to instruments executed before the passing of the Act.

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interest at 5*l.* *per cent.* on its amount, calculated from the first execution of the instrument: but the sum payable for interest is not to exceed the amount of such unpaid duty. Payment of the penalty, duty, and interest is to be denoted by an appropriate stamp: and the Commissioners retain the power of remitting the penalty within twelve calendar months after the first execution of the instrument; and where the instrument has been first executed out of the United Kingdom, it may be stamped at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only (*c*). The known want of proper stamps upon a lost deed cannot be supplied (*d*).

Payment of duties in Court, under 17 & 18 Vict. c. 125.

The 17 & 18 Vict. c. 125 (*e*), and now the 33 & 34 Vict. c. 97 (*f*), contain provisions under which, in any Court of civil judicature in the United Kingdom, an instrument not stamped, or insufficiently stamped, and of such a nature as to admit of its being stamped on payment of the duty and a penalty, may be rendered admissible in evidence, *pro hâc vice*, on payment of the duty, the penalty required by the Stamp Acts, and an additional penalty of 1*l.*; and the document is to be subsequently stamped by the Commissioners, on request, and on production of the receipt given by the officer of the Court for the duty and the penalties.

Ad valorem duty—amount of, depends solely on consideration stated.

As we have already seen (*g*), the amount of *ad valorem* duty is determined solely by the consideration appearing on the face of the conveyance; all the facts and circumstances affecting the liability to *ad valorem* duty, or the amount, must be fully and truly stated (*h*); and although a mis-statement of the consideration neither avoids the deed, nor

(*c*) See 33 & 34 Vict. c. 15; 13 & 14 Vict. c. 13.

(*d*) *Rippiner* v. *Wright*, 2 B. & Ald. 478; but see, as to agreements, *suprà*, p. 238, and as to presuming stamps, *suprà*, p. 326.

(*e*) See sect. 16.

(*f*) Sects. 28 & 29.

(*g*) *Suprà*, p. 525.

(*h*) 33 & 34 Vict. c. 10.

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affects its admissibility in evidence (*i*); yet any person who, with intent to defraud the Crown, either executes or is employed or concerned in the preparation of an instrument which does not fully and truly set forth all the facts and circumstances affecting duty, is liable to a penalty of 10*l.* (*k*); and, where the full purchase or consideration money is not truly stated, the purchaser, or his representatives, may recover from the vendor or his representatives so much of it as is not so stated (*l*). The commissioners may, upon an application being made to them respecting stamps, require to be furnished with an abstract of the instrument, and also with such evidence as they deem necessary to satisfy them that the consideration is truly stated (*m*).

Is payable, on what consideration.

By the 48 Geo. III. c. 149, sec. 22, and the 55 Geo. III. c. 184, *ad valorem* duty was made payable in respect of any money consideration, directly or indirectly paid or secured or agreed to be paid, or of a debt due to the purchaser and charged on the property, or of any gross or entire sum of money to be afterwards paid by the purchaser. When on a sale of an equity of redemption it was stipulated (*n*) that the purchaser should pay the mortgage debt, the duty was payable under this provision on the amount of the debt; but where there was no such stipulation, it was held (*o*) that the duty did not attach. This, however, was altered by the 16 & 17 Vict. c. 59 (*p*), which imposed the duty upon the amount of any mortgage, bond, or other debt, or any gross or entire sum of money, subject to which the property might be sold and conveyed; and this, irre-

(*i*) See, however, Tilsley, 3rd edit., p. 199; *supra*, n.

(*k*) 33 & 34 Vict. c. 97, sect. 10.

(*l*) *Vide suprà*, p. 525; 48 Geo. III. c. 149, s. 24; *Gingell* v. *Purkins*, 4 Exch. 720.

(*m*) See 33 & 34 Vict. c. 97, s. 20; and see 17 & 18 Vict. c. 83, s. 17.

(*n*) As to whether a mere covenant to *indemnify* the vendor would amount to such a stipulation, see and consider *Huntley* v. *Sanderson*, 1 Cro. & M. 467; and *Collinge* v. *Heywood*, 9 Ad. & E. 633: a recital of an agreement to pay, followed by a covenant to indemnify, would let in the duty; see *Carr* v. *Roberts*, 5 B. & Ad. 78.

(*o*) *Marquis of Chandos*, v. *Com. of I. R.* 6 Exch. 464.

(*p*) Sect. 10.

spectively of the question of liability on the part of the purchaser to pay such amount, or to indemnify the vendor, or any other person, against the same. But whether a conveyance in discharge of a *bonâ fide* existing debt not charged upon the property came within the provisions of these Acts was considered doubtful, although in practice it was usual in such a case to affix the *ad valorem* stamp (*q*). This doubt, however, is for the future removed by the 33 & 34 Vict. c. 97, sec. 73, which provides that where the consideration consists only or in part of a debt due to the purchaser, or where the property is sold subject, either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge on the property or not, such debt, money, or stock is to be chargeable with the duty.

On valuation of timber, fixtures, &c.

Where timber, fixtures, or any other parts of the inheritance, or the goodwill of a business, if made the subject of assignment (*r*), are valued separately, the amount of valuation must be stated as part of the consideration. On a sale of premises to which goodwill is attached, it was formerly considered, on the authority of a reported dictum of Lord Ellenborough, that no *ad valorem* duty was payable in respect of the value of the goodwill; but on a case being stated by the Commissioners, the Court of Exchequer held that goodwill is property within the Stamp Acts (*s*), and by the 17 & 18 Vict. c. 83, s. 19, past transactions were relieved against the penalties incurred in consequence of the mistake.

On life annuity, stock—several considerations.

Where the amount was incapable of being ascertained, (as where the consideration was a life annuity (*t*),) no *ad valorem* duty was formerly payable: but this, as respects

(*q*) And see *Gingell* v. *Purkins*, 4 Exch. 720.

(*r*) *Potter* v. *Com. of I. R.*, 10 Exch. 147.

(*s*) *Potter* v. *Commissioners of Inland Revenue*, 10 Exch. 147. As to the stamp duty payable on a deed of dissolution where the continuing partner purchases the retiring partner's interest, see *Christie* v. *Commissioners of Inland Revenue*, L. R. 2 Exch. 46.

(*t*) *Blandy* v. *Herbert*, 9 B. & C. 396.

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an annuity, was altered by the 16 & 17 Vict. c. 63, and 17 & 18 Vict. c. 83 (*u*), which imposed *ad valorem* duties upon a conveyance in consideration of an annual sum payable "in perpetuity, or for any indefinite period:" if, however, the annual sum were redeemable, the amount of the redemption-money or stock, &c., was to be considered the purchase-money, and to be charged with duty as such; and this, whether such redemption was optional or otherwise (*x*). So, formerly, no *ad valorem* duty attached when the consideration consisted of stock; but this, as we have seen (*y*), has been altered; and now, under the 33 & 34 Vict. c. 97, where the consideration consists wholly or in part of any stock, or security (whether marketable or not) (*z*), or of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, or of money payable periodically in perpetuity, or for an indefinite period not terminable with life, or of money payable periodically during any life or lives (*a*), in all these cases duty attaches, and the Act contains provisions for ascertaining the amount of duty payable in each particular case (*b*). Where the consideration is a periodical payment in perpetuity or for an indefinite period not terminable with life, the duty is calculated on the basis of what will be payable during twenty years, and where it is a periodical payment for life, during twelve years next after the date of the instrument (*c*).

Purchase-money may be reduced to lessen duty.

The vendor might and may, if he pleases, *bonâ fide* accept a less sum than the amount originally agreed to be paid, although the reduction be little more than nominal, and the sole object be to avoid a higher duty (*d*).

Duty not payable on money paid as

And no duty is payable in respect of a sum not paid to, or for the benefit of, the person who conveys, or directs the

(*u*) See Sched., tit. "Conveyance."

(*x*) See 16 & 17 Vict. c. 59, s. 11; and see 13 & 14 Vict. c. 97, and as to the latter Act, *Re Gell*, 8 Exch. 376, which gave rise to it.

(*y*) *Supra*, p. 527.

(*z*) Sect. 71.

(*a*) Sect. 72.

(*b*) See sects. 11—13, 71 & 72.

(*c*) Sect. 72.

(*d*) *Shepherd* v. *Hall*, 3 Camp. 180; Sug. 570.

conveyance of, the estate (e); but paid to, or settled upon, other parties, as part of a family arrangement (*f*).

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part of family arrangement.

Bankrupt's estate.

By the Bankruptcy Acts of 1849 and 1861, every deed, &c., relating to a bankrupt's estate remaining vested in him or in his assignee was exempted from stamp duty, except in respect of fees under the Acts (*g*); and the Act of 1869 contains a similar provision (*h*).

Assurances to friendly societies.

By the 10 Geo. IV. c. 56, s. 37, no bond *or other security* given to or on account of any friendly society established under the Act, nor any form of assurance authorized by the Act, was to be liable to stamp duty (*i*). The 10 Geo. IV. c. 56, was repealed by the 18 & 19 Vict. c. 63, the 37th section of which enacted that no bond to be given to or on account of any friendly society, nor any "document whatever required or authorized by or in pursuance of the Act or the rules of the society," shall be liable to stamp duty. It has been held that these general words must be restricted to acts done immediately by the society as such, or by their trustees in that capacity, and that a transfer of a mortgage to the trustees, the money being advanced out of the funds of the society in pursuance of their rules, is not exempt from duty (*k*).

By the law now regulating benefit building societies (*l*), the purpose for which such a society may be established is limited to raising, by subscriptions, a fund for making advances to members by way of mortgage (*m*); and any surplus may be invested upon real or leasehold securities (*n*).

(*e*) 4 B. & C. 246.

(*f*) *Denn d. Manifold* v. *Diamond*, 4 B. & C. 243; *Maisy* v. *Nanny*, 3 Bing. N. C. 478; and *In re Kerrey Glazier*, cited in Tilsley, 246; *Wigmore* v. *Joyce*, 13 Ir. L. R. 161.

(*g*) 12 & 13 Vict. c. 106, s. 138, and Schedule B. to 24 & 25 Vict. c. 134.

(*h*) 32 & 33 Vict. c. 71, s. 113.

(*i*) See sect. 4, and also sect. 8.

(*k*) *Re Royal Liver Friendly Society*, L. R. 5 Exch. 78. And see generally as to exemptions from stamp duty, Tilsley, 759, *et seq.*

(*l*) See 37 & 38 Vict. c. 42; repealing the 6 & 7 Will. IV., c. 32, except as to subsisting societies.

(*m*) Sect. 13.

(*n*) Sect. 25.

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The Act contains a general exemption from stamp duty in favour of the society, but this does not extend to a mortgage (o); and apparently there is no distinction, as respects the liability to duty between a mortgage by a member of the society, and one by a stranger on an advance out of the surplus funds. The Industrial and Provident Societies' Act, 1867, the operation of which is extended by the Industrial and Provident Societies' Act, 1871, contains a similar exemption from stamp duty.

Duty payable on money paid by lessee to party holding agreement for lease.

It has been decided, that where a person having an agreement for a lease sells his interest, and procures the lessor to grant the lease direct to the purchaser, and himself joins in the lease as a directing party, the purchase-money is liable to duty, and must be set forth as the consideration on the face of the lease (p): and the result, it is conceived, must be the same, although the holder of the original agreement be not made a party to the lease.

On building leases.

It was generally considered that a building lease was chargeable only with *ad valorem* duty on the rent; but in a modern case, the Court of Exchequer held that a lease containing a covenant for the erection of houses by the lessee was a lease made upon a further, or other valuable, consideration within the 17 & 18 Vict. c. 83, s. 16, and required to be also impressed with a deed stamp (q). This decision led to the 33 & 34 Vict. c. 44, which remedies past omissions, and provides for the future that no additional stamp duty is to be payable in respect of such further consideration; and the General Stamp Act, 1870 (r), contains a similar provision.

Duties payable under

The following scale of duties is payable under the 33

(o) Sect. 41.

(p) *Att.-Gen.* v. *Brown*, 3 Exch. 662; see indemnity clause, 13 & 14 Vict. c. 97, s. 10, in respect of penalties incurred under this doctrine, prior to the 20th March, 1850; see *Gingell* v. *Purkins*, 4 Exch. 720; and see now 33 & 34 Vict. c. 97, ss. 10, 74.

(q) *In re Bolton's Lease*, L. R. 5 Exch. 82.

(r) 33 & 34 Vict. c 97, s. 98.

& 34 Vict. c. 97 (r); *viz.*, where the amount or value of the consideration does not exceed 5*l.*, a duty of 6*d.*; where it exceeds 5*l.* and does not exceed 25*l.*, a duty of 6*d.* for every entire sum of 5*l.*, and for any fractional part of such sum; where it exceeds 25*l.* and does not exceed 300*l.*, a duty of 2*s.* 6*d.* for every entire sum of 25*l.* and for any fractional part of such sum; and where it exceeds 300*l.*, a duty of 5*s.* for every entire sum of 50*l.* and for any fractional part of such amount or value. The ordinary deed stamp is reduced from 35*s.* to 10*s.* (*s*); and the old progressive duty is abolished. But every instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters (*t*).

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33 & 34 Vict. c. 97.

Commissioners may determine proper amount of duty.

The Commissioners may now be required, apparently without fee or charge, to state their opinion whether any executed instrument is chargeable with duty, and with what amount (if any) of duty it is chargeable; and may stamp the deed with a stamp denoting, and which is to be evidence, either that the instrument is not chargeable with duty, or that it is duly stamped, as the case may require (*u*).

Certain conveyances exempted from increase of duty.

And (*x*) where any lands or other property shall have been actually and *bonâ fide* contracted to be sold prior to the 20th March, 1850, by any contract or agreement in writing duly stamped, or shall have been actually and *bonâ fide* sold under the decree of any Court made prior to the said 20th March, and shall be conveyed to the purchaser, or any other person, by his direction after the 10th October (*y*) and before or on the 31st March, 1851, the conveyance is to

(*s*) Sect. 4.

(*t*) Sect. 8. As to how the duty on leases is to be calculated, see sects. 96, *et seq.*; and as to the former scale of duties, see 13 & 14 Vict. c. 97, Sched.

(*u*) See sect. 18, and compare the similar provision in 13 & 14 Vict. c. 97, ss. 14 & 15, and 16 & 17 Vict. c. 59, s. 13; and see *Morgan* v. *Pike*, 14 C. B. 734.

(*x*) Sect. 16.

(*y*) 1850 seems to be accidentally omitted.

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be exempt from any *ad valorem* duty of a greater amount than would have been payable under the old law; but the grounds of exemption are to be proved to the satisfaction of the Commissioners, and a certificate of the matter so proved is to be written on the deed, and signed by them or some or one of them.

Vesting orders, liable to duty.

By the 15 & 16 Vict. c. 55 (*z*), vesting and releasing orders of the Court of Chancery, operating as conveyances, were subjected to the duties to which they would have been liable if they had been deeds; and under the recent Act (*a*), every decree or order of any Court whereby any property on the sale thereof is legally or equitably transferred to or vested in the purchaser is liable to duty.

Appointment of consideration.

Where property sold for one entire consideration is conveyed to the purchaser in separate parts by different instruments, the consideration is to be apportioned as the parties think fit, but the distinct consideration for each separate part is to be set forth in the conveyance relating thereto. In the case of a joint purchase, where the property is conveyed in parts by separate instruments, the conveyance of each separate part is chargeable with duty in respect of the distinct part of the consideration therein specified (*b*).

In case of sub-sale—sub-purchaser alone considered the purchaser.

Upon a sub-sale by a purchaser who has not obtained a conveyance, such purchaser and his sub-purchaser are considered to be the vendor and purchaser within the meaning of the Stamp Acts; and the duty payable upon the conveyances to the sub-purchaser (although the original vendor join therein) is determined solely by the amount paid by such sub-purchaser; and if the original vendor do not join in the conveyance to the sub-purchaser, and the same is duly stamped, no *ad valorem* duty is payable upon any subsequent conveyance of the legal estate by the original vendor.

(*z*) Sect. 13.

(*a*) 33 & 34 Vict. c. 97, ss. 70, 78.

(*b*) Sect. 74, sub-sect. 1 & 2.

None on deed of confirmation.

A deed executed by way of confirmation of a previous deed purporting to be a conveyance, and which has paid the *ad valorem* duty, is not itself liable to such duty, although the former deed was inoperative (*c*).

Is payable on principal assurance.

Where there are several assurances, the *ad valorem* duty is payable on the principal assurance; and the others are chargeable with such other duty as they may be liable to, not, however, exceeding the *ad valorem* duty payable in respect of the principal assurance; and what is to be deemed such in certain specified cases is defined by the Acts: and in any other case the parties may determine for themselves which is to be considered the principal instrument (*d*).

Stamps on collateral deeds of covenant.

And, under the 33 & 34 Vict. c. 97, any separate deed of covenant, not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage, made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or for all or any of those purposes, is charged with the *ad valorem* duty payable on the conveyance, if not exceeding 10*s*., or if such *ad valorem* duty exceed 10*s*., then with 10*s*. (*e*).

And on duplicates.

And any duplicate or counterpart of any instrument is charged with the duty charged on the original, if not amounting to 5*s*., and in any other case with 5*s*. (*f*).

Copies of court roll procured to be stamped by steward of manor.

The recent Act contains special provisions with reference to the stamping of the Court Rolls of surrenders and grants of copyholds, and makes the steward's certificate sufficient evidence that the documents are duly stamped (*g*). No

(*c*) *Doe d. Priest v. Weston*, 2 Q. B. 249.

(*d*) 33 & 34 Vict. c. 97, s. 78.

(*e*) 33 & 34 Vict. c. 97, s. 77; and see 1st Sched. to 55 Geo. III. c. 184, tit. "Conveyance."

(*f*) See Sched. to 33 & 34 Vict. c. 97, tit. "Covenant;" and compare 13 & 14 Vict. c. 97.

(*g*) 33 & 34 Vict. c. 97, Sched., tit. "Duplicate."

(*h*) 33 & 34 Vict. c. 94, s. 91.

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instrument is chargeable more than once with duty by reason of its relating to several distinct tenements, in respect of which several fines or fees are due to the lord or steward of the manor (*i*). All the facts and circumstances affecting duty are to be fully stated in a note to be delivered to the steward before the surrender or grant is made; and if the parties or the steward proceed before such note has been delivered, they are liable to heavy penalties. The steward must, within four calendar months after the date of any surrender or admittance, under a penalty of 50*l*., deliver out the usual copy of Court Roll duly stamped (*j*), but he may insist on payment of his fees and the stamp duty, before accepting the surrender or granting the admittance (*k*).

Conveyance by several owners, what stamps are necessary.

Where persons having separate estates or interests in the same property join in the conveyance, only one set of stamps is necessary (*l*): but several stamps are requisite where several parties deal by one assurance with their separate interests in separate properties. Such questions can seldom, if ever, arise upon a conveyance liable to *ad valorem* duty, but may occasionally have to be considered with reference to collateral deeds. In a case (*m*), where five tenants in common of copyholds contracted to sell at an entire price, the Court of Queen's Bench determined that, although only one stamp was payable upon the surrender, the purchaser must be admitted separately to each of the five estates in common, and that a separate stamp was payable for each admittance.

Further duty when deed has a double operation:

It was provided, by the 55 Geo. III. c. 184 (*n*), that "where any deed or instrument operating as a conveyance shall operate also as a conveyance of any other than the property sold by way of settlement or for any other purpose,

(*i*) Sect. 82.

(*j*) Sect. 85.

(*k*) Sect. 86; and compare 48 Geo. III. c. 149, ss. 33 & 34.

(*l*) Sug. 567; *Wills* v. *Bridge*, 4 Exch. 193; *Doe* v. *Tidbury*, 14 C. B. 304.

(*m*) *The Queen* v. *Eton College*, 8 Q. B. 526.

(*n*) See Schedule, tit. "Conveyance;" see, too, Schedule to 13 & 14 Vict. c. 97, tit. "Settlement."

or shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property, or relate to the title thereto, the same shall be charged with such further duty as any separate deed containing the other matter would have been chargeable with, exclusive of the progressive duty." Chap. XIII. Sect. 9.

Thus, where the conveyance operates also as a mortgage, the double duty is payable: however, in a case (*o*), where a purchaser of a copyhold estate from parties entitled thereto as equitable tenants in common, agreed with a third party for a loan upon a mortgage of the estate in order to enable him to complete the purchase; and the conveyance and mortgage were effected by the vendors surrendering the estate to the use of the mortgagee, and, subject thereto, to the use of the purchaser, (which surrenders, it is presumed, bore the proper *ad valorem* stamps,) a cotemporary deed, by which the vendors to the extent of their respective shares entered into covenants for title with the purchaser, and also separately with the mortgagee, and which contained the usual covenant by the purchaser with the mortgagee for payment of principal and interest, and to insure against fire, and a power of sale, was held to be sufficiently stamped with a single deed stamp and followers. The case, of course, was not within the above clause of the 55 Geo. III.; but it was contended that it was a multifarious deed, and fell within the general provisions of the 12 Anne, sess. 2, c. 9, s. 24 (*p*); but a contrary doctrine was laid down very broadly by the Court (*q*). **As on a conveyance and mortgage.**

Lord St. Leonards (citing Mr. Coventry) remarks that the clause above cited from the 55 Geo. III. c. 184, "does not seem to affect a conveyance of the property sold to such uses as the purchaser may choose to direct" (*r*). **But not on a conveyance to uses directed by purchaser.**

(*o*) *Rushbrook* v. *Hood*, 5 C. B. 131; 11 Jur. 931; and see, as to conveyances not on sale, *Doe* v. *Fereday*, 12 Ad. & E. 23.

(*p*) See Tilsley, 357.

(*q*) 11 Jur. 932; see the observations of Maule, J., and Wilde, C. J.

(*r*) Sug. 570.

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By the 33 & 34 Vict. c. 94 (s), any instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters; and an instrument made for any consideration in respect whereof it is chargeable with *ad valorem* duty, and also for any further or other valuable consideration, is to be charged with duty as if it were a separate instrument in respect of such last-mentioned consideration.

Matters which do not involve additional duty.

But a covenant to produce title deeds, or an assignment of a term in trust to attend, does not involve the payment of additional duty (t); nor is it payable in respect of an agreement for a lease of the property to the vendor being included in the conveyance, such agreement being considered as forming part of the contract (u).

Deed stamp unnecessary although *ad valorem* duty less than deed stamp.

And a deed stamp is not necessary by reason of the *ad valorem* duty being less than the amount of a deed stamp (x).

Appropriate stamps to be used.

Under the 33 & 34 Vict. c. 97 (y), a stamp, which by any word or words on the face of it is appropriated to any particular description of instrument, is not to be used, or if used is not to be available, for an instrument of any other description; and an instrument falling under the particular description to which any stamp is so appropriated, is not to be deemed duly stamped unless it is stamped with the stamp so appropriated. Except where otherwise expressly provided by the Act, all duties are to be denoted by impressed stamps only (z).

Presumption in favour of instruments having been stamped.

We have seen (a) that, in the absence of evidence to the contrary, the Courts will presume that a conveyance, which was duly executed, was also duly stamped.

(s) See sect. 8.

(t) Sug. 570; *Wolsley* v. *Cox*, 2 Q. B. 321; and see *Rushbrook* v. *Hood*, 5 C. B. 131.

(u) *Doe* v. *Phillips*, 11 Ad. & El. 796; *aliter* if there be an agreement for the sale of goods, *Clayton* v. *Burtenshaw*, 5 B. & C. 41.

(x) Sug. 571.

(y) Sect. 9.

(z) Sect. 23.

(a) *Suprà*, p. 326.

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Fresh stamps not necessary if instrument altered while *in fieri.*

As to whether fresh stamps become necessary by reason of alterations in the instrument the general rule appears to be (*b*), "that where, by reason of an alteration made in it, an instrument becomes a new one, a fresh stamp is requisite;" but not in any other case. It has been held that where the only conveying party to a marriage settlement had executed it, and then, upon the objection of other parties, a clause was struck out, and the deed was re-executed by the conveying party, the execution was only *in fieri*, and no new stamp was necessary (*c*): and it appears that, where only some of the parties to a deed have executed it, the filling up of blanks, or even making alterations which solely affect the interests of the parties who have not executed, will not involve the payment of additional duty (*d*): but this would not extend to a substitution of the name of a sub-purchaser, in place of that of the original purchaser, after the conveyance had been executed by the vendor (*e*).

Conveyances of land in colonies.

Lastly, we may remark that duty attaches upon assurances of land in the colonies, or elsewhere, if executed in this country (*f*).

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(10.) *As to the costs.*

As to the costs.

Costs of conveyance are borne by purchaser:

of execution by vendor.

The purchaser (in the absence of any express agreement) prepares, and pays for the preparation of, his conveyance (*g*): but the costs of perusal and execution by all necessary conveying parties fall on the vendor (*h*); including, it is conceived, the costs of all matters essential to the validity of the deed as a perfect conveyance; *e.g.*, the acknowledgment by married women and the filing of the certificate of acknowledgment, and the enrolment of a disentailing deed and deed of consent by the protector upon a sale by a

(*b*) See Tilsley, 366.

(*c*) *Jones* v. *Jones*, 1 Cro. & M. 721.

(*d*) See Tilsley, 374, and cases cited.

(*e*) *London and Brighton R. Co.*, v. *Fairclough*, 2 Man. & Gr. 674.

(*f*) *Wright* v. *Commissioners of Inland Revenue*, 25 L. J. C. P. 49.

(*g*) Sug. 261.

(*h*) *Ibid.*

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tenant in tail; nor will a condition throwing the expense of the conveyance, surrender, &c., on the purchaser, extend to the expense of procuring the concurrence of necessary parties; or, in the case of copyholds, of procuring their necessary previous admission on the Court Rolls, although rendered necessary by events subsequent to the contract (*i*); or of proceedings under the Trustee Act (*k*): but a purchaser always pays for the registration of his conveyance (*l*); as an unregistered deed is valid except as against adverse claimants under a registered instrument: and he must now, in the case of a sale since 1874, in the absence of stipulation to the contrary in the contract, pay the costs of any covenant for the production of deeds, other than the costs of perusal and execution on behalf of and by the vendor and other necessary parties (*m*).

Of getting in legal estate from infant devisee of vendor.

Where will before contract.

Where will after contract.

Where a testator, having devised an estate in strict settlement, contracted to sell part and died before conveyance, the costs of the necessary suit for obtaining a conveyance under the 1 Will. IV. c. 60, s. 17, were directed to be paid out of the vendor's estate (*n*): but, in a modern case, where, on a purchase by a railway company under its compulsory powers the vendor died before conveyance, having by his will, made before the contract, devised his estate to his children, some of whom were infants, it was held that the company were not liable to pay the vendor's costs of a suit for specific performance (*o*); and it seems to be now settled that where the suit is occasioned by a will made previously to the contract, no costs will be given on either side (*p*). Where, however, the vendor, after the date of the contract, devises the estate

(*i*) *Paramore* v. *Greenslade*, 1 Sm. & G. 541.

(*k*) *Bradley* v. *Munton*, 16 Beav. 294; *Re South Wales R. Co.*, 14 Beav. 418. But see now *Re Liverpool Improvement Act*, L. R. 5 Eq. 282.

(*l*) See *Mittelholzer* v. *Fullarton*, 6 Q. B. 989, 1019.

(*m*) 37 & 38 Vict. c. 78, s. 2, r. 4.

(*n*) *Farrar* v. *Earl of Winterton*, 4 Y. & C. 472; and see *Heard* v. *Cuthbert*, 1 Ir. Ch. R. 369.

(*o*) *London and S. W. R. Co.* v. *Bridger*, 10 Jur. N. S. 650.

(*p*) *Wortham* v. *Lord Dacre*, 2 K. & J. 437; *Hall* v. *Bushill*, 35 L. J. Ch. 381; see also *Bannerman* v. *Clarke*, 3 Drew. 632; where, however, it does not appear whether the will was before or after the contract.

in strict settlement or to an infant, so that a suit is necessary to obtain a conveyance, his estate must bear the whole of the costs thus occasioned (q).

Of getting in legal estate from infant heir of vendor.

Where a vendor died intestate before conveyance, leaving an infant heir, the costs of the necessary suit, and of the conveyance being settled in Chambers, were ordered by Shadwell, V.-C., to be paid out of the purchase-money (r): but in a later case, where the death occurred within two months after the contract, Knight Bruce, V.-C., refused to give costs, and suggested that there must have been some default on the part of the vendor in the case last referred to (s); and it is now well settled that, where the difficulty arises from a common calamity, no costs will be given on either side as between vendor and purchaser (t): but the infant heir, not disputing the contract, may be entitled to have his costs out of the purchase-money, on the ground that he is a mere trustee (u); if, however, he dispute the contract, he will have to pay the costs of a suit to compel a conveyance from him (x). Where, after the contract, one of several vendors became of unsound mind, no costs of a suit to obtain a vesting order were given on either side (y). But where at the date of the contract the legal estate is in an infant the expenses of having the conveyance settled by the Court must be borne by the vendor, although the purchaser bought with notice of the state of the title (z).

Purchaser of copyholds pays for surrender and admittance;

A purchaser of copyholds pays the fine on admittance, and the steward's fees, both on the surrender and admittance (a);

(q) *Wortham* v. *Lord Dacre*, *ubi sup.*; *Purser* v. *Darby*, 4 K. & Jo. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414; *Williams* v. *Glenton*, L. R. 1 Ch. Ap. 200.

(r) *Midland Counties R. Co.* v. *Westcomb*, 11 Sim. 57.

(s) *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Hinder* v. *Streeten*, 10 Ha. 18; *Armitage* v. *Askham*, 1 Jur. N. S. 227; *Re Manchester, &c., R. Co.*, 19 Beav. 365.

(t) See cases cited above, and *Barker* v. *Venables*, 11 Jur. N. S. 480.

(u) See *Barker* v. *Venables*, 11 Jur. N. S. 480.

(x) *Hoddel* v. *Pugh*, 33 Beav. 489.

(y) *Cresswell* v. *Haines*, 8 Jur. N. S. 208.

(z) *Browne* v. *Lake*, 15 L. J. N. S. Ch. 34.

(a) *Drury* v. *Man*, 1 Atk. 95, n.,

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but, of course, the vendor pays the private expenses of both himself and the other necessary parties to the surrender. An agreement to surrender and assure the estate at his own costs and charges will not render him liable to the fine payable upon admittance (b). It seems doubtful whether the steward has power to authorize his deputy to receive the fine for the lord (c).

but vendor pays for his own admittance if necessary.

And if the vendor must himself be admitted and pay a fine before surrendering, he of course bears these additional expenses (d).

Fine not claimable before admittance.

The lord's right to the fine accrues only on actual admittance; so that the steward cannot refuse to admit until the fine is paid (e): and an agreement to pay the "costs and charges of admittance" does not extend to the fine (f). If copyholds are devised to uses to be declared by executors or trustees for sale, and the heir is admitted *quousque*, and then buys of the executors or trustees, who appoint to his use, he must be re-admitted, and pay a second fine (g).

Steward's fees on admittance to an allotment held under several titles.

Where an allotment under an Inclosure Act had been made generally in respect of the landowner's several copyhold tenements, and the custom of the manor was to pay the same fee on admission to part as on admission to the whole of a tenement, the steward, upon the subsequent admittance of a purchaser to part of the allotment, was held to be entitled to as many fees as the allottee had tenements at the time of the inclosure (h).

Saunders' edit.; Scriv. on Copyholds, 5th ed., p. 218, 317. As to the charges in respect to several tenements, *vide suprà*, p. 569; and as to stamp duties in respect of several distinct tenements comprised in the same instrument, see 33 & 34 Vict. c. 97, s. 82.

(b) *Graham* v. *Sime*, 1 East, 632.

(c) *Bridges* v. *Garrett*, L. R. 4 C. P. 580; and *vide suprà*, p. 660.

(d) See *Drury* v. *Man*, *ubi sup.*; and see *Paramore* v. *Greenslade*, 17 Jur. 1064; 1 Sma. & G. 541.

(e) *Reg.* v. *Wellesley*, 2 El. & B. 924; Scriv. Copyholds, 5th ed. 204.

(f) *Barrow* v. *Barrow*, 3 W. R. 587, V.-C. W.

(g) *Reg.* v. *Corbett*, 1 El. & B. 836; Scriv. Copyholds, 5th ed. 203.

(h) *Evans* v. *Upsher*, 16 M. & W. 675; sed *vide suprà*, p. 500.

The lord is not entitled to any fine or compensation upon a conveyance by a copyholder under the 95th section of the Lands Clauses Consolidation Act; or upon the enrolment of such conveyance (*i*).

Costs of lease.

Upon the grant of a lease the lessor's solicitor usually, but not invariably, prepares the lease; and the well-known practice is, for the lessee to pay both his own and the lessor's expenses. Where land is sold in consideration of a rent-charge, the assurance partakes of the natures of a conveyance and a lease: upon this ground it is suggested in a work of considerable reputation (*k*) that the costs should be equally divided between the parties. If the vendor require a counterpart of the deed, he may, it is conceived, be fairly asked to pay for the counterpart: but (with this exception) it seems difficult to understand why the circumstance of his sustaining a mixed character of vendor and lessor should be a reason for his paying a proportion of costs which neither vendor nor lessor singly is ever liable to pay.

Of conveyance in consideration of rent-charge.

Purchasers pay vendor's costs on sale under Lands Clauses Consolidation Act.

Upon a sale under the Lands Clauses Consolidation Act, 1845, the company must pay the vendor's costs, either under sect. 80 or sect. 82, according as the land has been taken in exercise of their compulsory powers, or by agreement with the landowner. By the latter section, which is applicable to purchases by agreement, the company must pay the vendors all their costs of the conveyance, and the costs of making out and proving their title (*l*); such costs (if the parties differ) to be taxed by the Master (*m*). This section provides simply for the legal expenses of making out the title to, and of conveying, the property; taking these expenses in their largest sense: but not for any costs of ascertaining what that is which is to be put into the document (*n*): thus, the costs of apportioning an entire

As to costs of conveyance, &c., under section 82.

(*i*) *Ecclesiastical Commissioners* v. *London and S. W. R. Co.*, 14 C. B. 743.

(*k*) 9 Jarm. Conv. by S. 518.

(*l*) *Re Spooner's Estate*, 1 K. & J. 220.

(*m*) Sect. 83.

(*n*) Per V.-C. W. in *Ex parte Buck*, 1 H. & M. 519.

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ground-rent, between houses taken by the company and others retained by the vendor, have been held not to fall upon the company (o). As respects, therefore, such preliminary and other expenses of sale as are not provided for by this section, the vendor should either expressly stipulate for their payment, or he may make them a ground for claiming larger compensation if he goes before a jury. Unless the company have agreed to pay all the costs of and incidental to the conveyance (p), it has been held that they are not liable, under this section, to pay the costs of getting the legal estate out of the infant heir or devisees of the vendor (q): but, in a late case (r), this rule was questioned; and the point can scarcely be regarded as settled. In the case just referred to, the costs of taking out administration, which was necessary in order to obtain a legal assignment of the property, were held to fall within this section. The vendor has no lien for the amount of his costs upon the moneys deposited under the 85th section (s).

General expressions whether sufficient to throw costs of reinvestment on purchasers.

It had been considered that general expressions referring to costs to be incurred in consequence of the sale, or the proposal for the sale, or the taking of the land, whether occurring in an Act of Parliament or a private agreement (t), would not throw upon the purchasers the costs of re-investment: but it has been decided that such costs are included in a provision for payment of costs "attending the application for re-investment" of money paid into Court (u).

As to costs under section 80.

Where the land is taken by the company in the exercise of their compulsory powers, and the purchase-money has been deposited in the bank under the provisions of the Act,

(o) Per V.-C. W., in *Ex parte Buck*, 1 H. & M. 519.

(p) *Lake* v. *Eastern Counties R. Co.*, 19 L. T. 323.

(q) *Armitage* v. *Askham*, 1 Jur. N. S. 277; *Re S. Wales R. Co.*, 14 Beav. 418; *Re Manchester & Southport R. Co.*, 19 Beav. 365.

(r) *Re Liverpool Improvement Act*, L. R. 5 Eq. 282.

(s) *Re London and S. W. R. Co.*, 16 Sim. 165; Phil. 772; *Ex parte Great Northern R. Co.*, 16 Sim. 171.

(t) See *Re London Bridge Acts*, 13 Sim. 180.

(u) *Re Byron*, 4 De G. M. & G. 694; a case under a kindred Act; and see *Lake* v. *Eastern Counties R. Co.*, 19 L. T. 323.

the company is liable to pay the costs of the purchase or taking of the land, or which shall have been incurred in consequence thereof (other than such costs as are otherwise provided for by the Act); and the costs of the investment of such moneys in government or real securities; and of the re-investment thereof in the purchase of other lands; and also the costs of obtaining the proper orders for any of the above purposes; and of the orders for payment of income, and for payment out of Court of the principal, and of all proceedings relating thereto, except such as are occasioned by adverse claimants: but those cases are excepted where the moneys are so deposited by reason of the wilful refusal of the party entitled thereto to receive the same, or to convey or release the lands, or by reason of the wilful neglect of any party to make out a good title to the land required. Chap. XIII. Sect. 10.

As to costs under the 80th section.

We may here refer, on the question of costs under this section, to what we have stated above, as to the re-investments which will be sanctioned under the 69th section (*x*); and, in addition to the cases there cited, we may remark that the costs payable by the company under the 80th section include costs of brokerage payable on the investment of the purchase-money in stock (*y*); of a power of attorney to get the money out of Court (*z*); of a disentailing assurance, where necessary (*a*); of enrolling a purchase-deed on re-investment (*b*); of apportioning the ground-rent on the sale of part of a leasehold estate (*c*); of taking out administration in order to complete the title to lease-

(*x*) *Vide suprà*, p. 663, *et seq.*

(*y*) *Ex parte Braithwaite*, 1 Sm. & G. App. xv.; *Ex parte Corporation of Trinity House*, 3 Ha. 95.

(*z*) *Re Godley*, 10 Ir. Eq. Rep. 222; *Ex parte Incumbent of Guilden Sutton*, 8 De G. M. & G. 380.

(*a*) See *Re Brooking's Devisees*, 2 Giff. 31; *Ex parte Slater's Devisees*, 5 R. Ca. 200; but see *Ex parte Thoroton*, 17 L. J. Ch. 167. It has been held that a disentailing deed is not necessary; see *Re S. E. R. Co.*, 30 Beav. 215; *Re London and N. W. R. Co.*, 1 H. & M. 445; *Sowry* v. *Sowry*, 6 Jur. N. S. 337: but more recently that such a deed is necessary, see *Re Butler's Will*, L. R. 16 Eq. 479; and *vide suprà*, p. 690.

(*b*) *Re Governors of Christ's Hospital*, 12 W. R. 669.

(*c*) *Re London, Brighton, & S. C. R. Co., Ex parte Flower*, L. R. 1 Ch. Ap. 599.

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holds (*d*); of a reference in lunacy (*e*); of the proceedings in a pending suit relating to the land, and not occasioned by adverse litigation (*f*), as, *e. g.*, where the land is the subject of an administration suit, and a reference as to the propriety of the proposed purchase and other proceedings is necessary (*g*); or of an inquiry for the purpose of ascertaining the parties entitled to the purchase-money paid into Court (*h*); of an abortive attempt to ascertain the price (*i*); of an abortive *bonâ fide* attempt to re-invest (*k*), except where it fails by reason of the Court disapproving the proposed purchase; of repeated applications for payment of dividends to successive incumbents of a living (*l*); of the transfer of the purchase-money from the account of the railway to that of a pending administration suit (*m*); of interim investments in stock (*n*); of successive re-investments in land (*o*); and the petitioners may select what land

(*d*) *Re Liverpool Improvement Act*, L. R. 5 Eq. 282; overruling *Re South Wales R. Co.*, 14 Beav. 418.

(*e*) *Re Taylor*, 1 Mac. & G. 210; *Re Walker*, 20 L. J. 474; 7 R. Ca. 129; *Re Briscoe*, 2 De G. J. & S. 249.

(*f*) *Haynes* v. *Barton*, 1 Drew. & Sm. 483; and see the cases cited in Morgan & Davey on Costs, p. 196, and *Haynes* v. *Barton*, L. R. 1 Eq. 422.

(*g*) *Picard* v. *Mitchell*, 12 Beav. 486; *Henniker* v. *Chafy*, 28 Beav. 621.

(*h*) *Re Singleton*, 9 Jur. N. S. 941.

(*i*) *Ex parte Morris*, L. R. 12 Eq. 418.

(*k*) *Ex parte Rector of Holywell*, 2 Dr. & Sm. 463; *Ex parte Copley*, 4 Jur. N. S. 297; and see *Ex parte Hardy*, 18 Jur. 370; *Ex parte Woolley*, 17 Jur. 850.

(*l*) *Re Birkenhead R. Co.*, 2 Jur. N. S. 793; and see *Ex parte Incumbent of Guilden Sutton*, 8 De G. M. & G. 380.

(*m*) *Dinning* v. *Henderson*, 2 De G. & S. 485; and see *Melling* v. *Bird*, 22 L. J. Ch. 599; 17 Jur. 155.

(*n*) *Re Liverpool R. Co.*, 17 Beav. 322; *Re Gould*, 24 Beav. 442; but see *Re Lomax*, 34 Beav. 294; where a second investment on mortgage security was directed to be treated as a permanent investment as respects costs payable by the company; and see also *Re Flemon's Trusts*, L. R. 10 Eq. 612; but in a later case, an investment on mortgage security was treated as a mere temporary investment, and the company had to pay the costs without any condition as to the costs of a future permanent investment; *Re Blyth's Trusts*, L. R. 16 Eq. 468.

(*o*) *Re St. Katherine's Dock Co.*, 3 R. Ca. 514; *Ex parte Trustees of St. Bartholomew's Hospital*, 4 Drew. 425; *Ex parte Bouverie*, 4 R. Ca. 229; *Brandon* v. *Brandon*, 11 W. R. 63; *In re Merchant Tailors' Co. and London Bridge Act*, 10 Beav. 485, where the costs of a fourth and last re-investment were allowed, the balance sought to be invested being only 63*l.*; *Ex parte the Rector of Loughton*, 14 Jur. 102, where the amount of the second investment was only 6*l.*, part

they please; and if by reason of litigation which is not occasioned by adverse claims, or by a suit to which the land when taken was subject, additional costs are incurred, the company must bear them (*p*).

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Where there has been a re-settlement since the purchase.

So, where, after the purchase, but before re-investment, there was a re-settlement of the property in pursuance of a previously subsisting trust to re-settle, the company was ordered to pay all the costs of re-investment (*q*): and although it seems clear that a person, who at the time of purchase is absolute owner of the land, has no right to insist on having a re-investment at the expense of the company (*r*), it is doubtful whether the fact of a person becoming absolute owner subsequently to the purchase, relieves the company from the liability to pay the costs of re-investment (*s*). As a general rule, it may be laid down that, in doubtful cases, the Court leans towards making the company pay the costs (*t*); but, at the same time, such costs will not be allowed to be unnecessarily increased; as, *e.g.*, by the introduction of irrelevant matter into the petition (*u*); or by presenting a second petition by reason of a defect in the first (*x*); or by the investment of other moneys besides those paid by the company (*y*).

of a balance of 20*l.* 9*s.* 5*d.*, and the Court directed the balance to be paid to the purchaser, and fixed the company with the costs: and *Jones* v. *Lewis*, 2 Mac. & G. 163, where it was held (reversing the decision of V.-C. K. B.) that the vendors were entitled to an unlimited number of re-investments, unless made vexatiously, or in an unreasonable exercise of the direction to invest: and the reasoning of the Court would seem to apply to cases within the Lands Clauses Act; and see Morgan's Chancery Acts, p. 52.

(*p*) *Carpmael* v. *Proffitt*, 17 Jur. 875; *Eden* v. *Thompson*, 2 H. & M. 6; *Haynes* v. *Barton*, 1 Drew. & Sma 483; L. R. 1 Eq. 422.

(*q*) *Re De Beauvoir*, 2 De G. F. & Jo. 5; reversing V.-C. K. 8 W. R. 625.

(*r*) But see *Re Pick*, 10 W. R. 335.

(*s*) See *Re De Beauvoir*, *ubi suprà.*

(*t*) See *Ex parte Marshall*, 1 Ph. 560; *Re Jones' Settled Estates*, 4 Jur. N. S. 581.

(*u*) *Ex parte Osbaldiston*, 8 Ha. 31.

(*x*) *Re London, Brighton, and S. C. R. Co*, 18 Beav. 612; and see *Re Byron*, 5 Jur. N. S. 261; but *secus* where the defect is in the order made on the first petition, *Re Goe's Trusts*, 3 W. R. 129.

(*y*) *Re Braumer*, 14 Jur. 236; *Ex parte Hodge*, 16 Sim. 159; *Ex parte Lord Palmerston*, 4 Rail. Ca. 57, n.; and see *In re Elliott*, 17 L. T. 241, V.-C. C.; *Ex parte King's College*

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The rule that the company are not to bear the additional costs thus occasioned seems a very proper one, but its practical operation must vary with the state of the title to the land purchased. In the case of a large estate, held under the same title, the difference of stamp duty may fully represent the difference between the necessary expenses of a purchase of ten acres, and a purchase of 1000 acres: while on the other hand, where land is held under different titles, a small addition to the purchase-money may involve a very serious additional amount of costs.

The existence of a contract for a purchase by way of permanent re-investment, is no ground for refusing the costs of a temporary re-investment made pending such contract (*z*).

What costs are not within the 80th sect.

The fines payable on an investment in copyholds do not fall on the company (*a*); and it has been held that the costs of re-investment in the alteration of alms-houses, or in the erection of new farm buildings, are not within the section (*b*): but in later cases such an investment has been sanctioned (*c*). The costs of applying the money in paying off incumbrances affecting other parts of the settled estates are not expressly provided for by the Act. In several cases it has been held that such costs are not payable by the company (*d*); but if any portion of the land taken is subject

5 De G. & S. 621. See as to costs which are not payable by the company, being paid out of the fund in Court, *Ex parte Newton*, 4 Y. & C. 518; *Ex parte Archbishop of Canterbury*, 1 Coll. 154; *Ex parte Bishop of Hereford*, 5 De G. & S. 265 (cases under the Copyhold Enfranchisement Act); *Re Woolley*, 17 Jur. 850; *Re Aubrey*, 17 Jur. 874; *Re Hardy*, 18 Jur. 370. As to costs of opposing the bill in Parliament not being allowed to the tenant for life out of the fund, see *Re Earl of Berkeley's Will*, L. R. 10 Ch. Ap. 56.

(*z*) See *Re Liverpool R. Co.*, 17 Beav. 392.

(*a*) *Ex parte Vicar of Sawston*, 4 Jur. N. S. 473.

(*b*) *Re Oxford W. & W. R. Co.*, 27 Beav. 571; *Re Bucks R. Co.*, 14 Jur. 1065; but see *Re Lathropp's Charity*, L. R. 1 Eq. 467.

(*c*) *Vide Suprà*, p. 664.

(*d*) See *Ex parte Corporation of Sheffield*, 21 Beav. 162; *Ex parte Town Trustees of Sheffield*, 8 W. R. 602. See, upon similar clauses in private Acts, *Ex parte the Earl of Hardwicke*, 12 Jur. 508; *In re Yeates*, 12 Jur. 279; *Ex parte Trafford*, 2 Y. & C. 522; *Ex parte Northwick*, 1 Y. & C. 166.

to the mortgage, it would seem that the company must pay the costs of an application for the discharge of the incumbrance (*e*).

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What is "wilful refusal."

The wilful refusal and neglect mentioned in the 80th section, which exempt the company from liability to payment of costs, are such as arise from mere will or caprice; and not from an exercise of reason (*f*), or where there is a *bonâ fide* legal doubt. Thus, where a landowner, being advised by counsel that certain commissioners were not entitled to take his land, refused to convey, and the purchase-money was paid into Court, it was held that he was not disentitled to his costs (*g*); so where the vendor cannot convey, by reason of his inability to clear off incumbrances of greater amount than the value of the land taken, he will not be deprived of his costs (*h*). But where a vendor insisted on payment of his costs, as well as of his purchase-money before giving up possession, and the purchase-money was paid into the bank under the 76th section, he had to pay his own costs of the petition for payment out (*i*); and a vendor may, under special circumstances, even be ordered to pay the costs of the company (*k*).

What is "adverse litigation."

We have already seen that the existence of a pending administration suit, or other suit relating to the land taken, which necessitates service of the petition on other parties, or an enquiry as to the propriety of the proposed sale, or as to the parties entitled to the purchase-money, is not "adverse litigation" within the meaning of the 80th section (*l*).

(*e*) See *London and S. W. R. Co.*, 2 J. & H. 390.

(*f*) *Ex parte Bradshaw*, 16 Sim. 174; *In re the Windsor, &c. R. Act*, 12 Beav. 522; *Ex parte Railston*, 15 Jur. 1028, V.-C. K.; overruling *Elliott* v. *Turner*, 13 Sim. 477, 485; *Re Divers*, 1 Jur. N. S. 995.

(*g*) *Ex parte Dashwood*, 3 Jur. N. S. 103.

(*h*) *Re Divers*, 1 Jur. N. S. 995.

(*i*) *Re Turner's Estate*, 10 W. R. 128; he had also to pay the costs of calling in the sheriff to give possession.

(*k*) See *Ex parte Hyde*, cited Seton, 1087.

(*l*) See *Haynes* v. *Barton*, 1 Drew. & Sma. 483; L. R. 1 Eq. 422; *Henniker* v. *Chafy*, 28 Beav. 621; and *vide suprà*, p. 714.

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And in fact, in order to bring a case within the exception, there must be an actual *litis contestatio* (m).

In one case, although the Court seemed to think that the exception did not apply to a question of construction decided upon petition, but only to a case where an action at Law was necessary to decide the rights of the parties, the order was ultimately made with the usual exception (n): and where the question of construction was argued between petitioners and respondents, the company had to pay only one set of costs (o): so, where one of two claimants of the fund abandoned his claim, the company was held not to be liable for the costs occasioned by the adverse claim (p). Where, however, the company took a conveyance from each of two adverse claimants, they had to pay the costs of both, on a petition for re-investment by the one, served on the other (q).

As to costs of service and appearance.

The rule which throws upon the company the costs of the service of the petition upon all necessary parties, and of their appearance thereon, does not hold where the costs are vexatiously increased; as, *e.g.*, where parties, who ought to have appeared together, appear separately (r); or where parties unnecessarily appear (s): and where the application is merely that the fund may be transferred to the credit of the cause, it is unnecessary to serve all the parties to the suit; and, if they appear, they will not be allowed their costs (t); and, in one case (u), the company, although ordered to pay the costs of serving the respondents, had not to pay their costs of appearance. Where the application is

(m) *Re Longworth's Estate*, 1 K. & J. 1; *Re Spooner's Estate*, ib. 220; *Re Hungerford's Trusts*, ib. 413; *Re Singleton*, 9 Jur. N. S. 941; *Re Cant's Estate*, 1 De G. F. & J. 153; and for form of order see *Ex parte Hooper*, 1 Drew. 269; Seton, 1072.

(n) Per V.-C. K. in *Re Tookey's Trust*, 16 Jur. 1708; and see *Ex parte Palmer*, 13 Jur. 781.

(o) *Ex parte Styan*, Johns. 387.

(p) *Re English*, 13 W. R. 932.

(q) *Re Butterfield*, 9 W. R. 805.

(r) *Ex parte Baroness Braye*, 11 W. R. 333.

(s) See *Ex parte Bishop of London*, 2 De G. F. & Jo. 14.

(t) *Melling* v. *Bird*, 22 L. J. Ch. 599.

(u) *Sidney* v. *Wilmer*, 31 Beav. 338.

for payment out or re-investment of the fund, all the parties to the suit (including those who have obtained leave to attend the proceedings) must be served; and they will, as a general rule, be allowed their costs of appearance (x): but, in one case, where the land taken formed part of an estate which was being administered in Court, and a petition for re-investment was presented by the tenant for life, it was laid down that the trustees and remaindermen, if they approved of the application, should either be made co-petitioners, or abstain from appearing (y).

Where no suit is pending.

Where no suit is pending, the petition of a tenant for life for re-investment need not be served on the remaindermen; and the company will not have to pay their costs of service and appearance (z): but, according to the present practice, trustees who have been served and who appear, will be allowed their costs against the company (a). After considerable conflict of the authorities, it appears to be now settled, that the company are bound to pay a mortgagee's costs of appearance (b); but not where the mortgage affects only the interest of the tenant for life (c), unless the company require the incumbrancer to appear (d); nor where the mortgage affects only part of the land, but not the part which is taken (e); or has been created subsequently to the payment of the purchase-money into Court (f). In a very

Costs of mortgagee.

(x) *Haynes* v. *Barton*, 1 Dr. & Sm 483; L. R. 1 Eq. 422; *Re Long*, 12 W. R. 460; *Bradshaw* v. *Fane*, 1 N. R. 159.

(y) *Wilson* v. *Foster*, 26 Beav. 398; and compare *Re Romney*, 3 N. R. 287; *Re Baroness of Braye*, 9 Jur. N. S. 454; and see *Re Crane's Estate*, L. R. 7 Eq. 322, where the remainderman was served, and allowed his costs against the company; and *Re Gore Langton's Trusts*, W. R. 20 March, 1875.

(z) *Ex parte Staples*, 1 De G. M. & G. 294; and see *Re Legge's Estate*, 8 W. R. 559; *Re Bowes' Estate*, 4 N. R. 315; *Wilson* v. *Foster*, 26 Beav. 293; but see *Re Crane's Estate*, *ubi suprà*.

(a) *Re Duke of Cleveland's Harte Estates*, 1 Drew & Sm. 430.

(b) *Re Brooke*, 30 Beav. 233; *Ex parte Baroness Braye*, 11 W. R. 333; *Ex parte Peyton*, 2 Jur. N. S. 1013; *Re Nash*, 25 L. J. Ch. 29. See *contrà*, *Re Hatfield's Estate*, 29 Beav. 370, which seems to be overruled.

(c) *Ex parte Smith*, 6 R. Ca. 150; and see *Re Webster*, 2 Sm. & G. App. vi.

(d) *Re Hungerford*, 1 K. & Jo. 413.

(e) *Re Yeates*, 12 Jur. 279.

(f) *Re Middle Level Commissioners*, June 23, 1864, V.-C. K. cited Morgan and Davey, p. 200.

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recent case (*g*), the Court of Appeal in Chancery laid it down that whenever there is simply a petition for the re-investment of money in land, the proper course is to serve such persons as mortgagees or annuitants with a copy of the petition, and to give them 40s. for costs; giving them at the same time an intimation that if they appear upon the hearing, they will probably not get their costs.

How costs are borne where there are several companies.

Where land of the same owner is taken by several companies, they must pay in equal shares the costs of a petition for re-investment; but they pay *ad valorem* stamp and surveyor's fee in proportion to the amount of the purchase-money which they respectively contribute (*h*). The rule, however, is not inflexible, and will be departed from in a case of peculiar hardship (*i*); but not on the mere ground of the inequality of the sums paid into Court by the several companies (*k*). The order for payment out or re-investment may be obtained on one petition (*l*). In one case, where the several companies had amalgamated since the payment into Court, Lord Romilly held that for the apportionment of the costs of petition, they must be treated as separate companies (*m*); but in a subsequent case (*n*), the same learned judge ordered the costs to be paid equally by the subsisting companies.

The only uniform principle which can be traced in the authorities is, that the company is not to be needlessly burdened with costs; and the above rules must be regarded merely as examples of its application. What are necessary

(*g*) *Re Gore Langton's Settled Estates*, W. N. 1875, p. 58.

(*h*) *Ex parte Bishop of London*, 2 De G. F. & Jo. 14; *Ex parte Earl of Lonsdale*, 32 Beav. 397; *Re Merton College*, 33 Beav. 257; *Re Carlisle and Silloth R. Co.*, *ib.* 253; and as to surveyor's fee, see *Ex parte Corporation of London*, L. R. 5 Eq. 418. The cases of *Ex parte Governors of St. Thomas's Hospital*, 7 W. R. 425, and *Ex parte Christ Church*, 9 W. R. 474, are overruled.

(*i*) *Re Byron*, 1 De G. Jo. & S. 358.

(*k*) *Ex parte Governors of Christ's Hospital*, 2 H. & M. 166.

(*l*) *Re Lord Broke's Estate*, 1 N. R. 568.

(*m*) *Re Maryport and Carlisle R. Co.*, 1 N. R. 545; 32 Beav. 397.

(*n*) *Ex parte Corpus Christi Coll. Oxford*, L. R. 13 Eq. 334.

costs must depend, in each particular case, upon the special circumstances; and it would be impossible to lay down any inflexible rule upon the subject (*o*).

Costs of arbitration under L. C. C. Act.

Upon an arbitration under the Lands Clauses Consolidation Act, the costs need not be incorporated in the award, but may be ascertained at any subsequent period by the persons or person (whether arbitrators or umpire) by whom the award is made (*p*). And by a recent Statute, either party may require the costs of the arbitration to be settled by one of the taxing-masters of the Superior Courts of Law (*q*).

Vendor bears additional ex-

The purchaser, it appears, may generally (*r*), although

(*o*) See as to costs under cognate private Acts, *Ex parte Marshall*, 1 Ph. 560; *Ex parte Molyneux*, 2 Coll. 273, and cases there cited; *Mitchell* v. *Newell*, 3 Rail. Ca. 515; *Ex parte Gore Langton*, 11 Jur. 686; *Ex parte Thoroton*, 12 Jur. 130; *Re Robertson*, 23 Beav. 433; *Re Land's Trust*, 4 K. & Jo. 81; *Re Harrison's Estate*, L. R. 10 Eq. 532; *Re Charity Schools of St. Dunstan*, L. R. 12 Eq. 537; and *Re Lord Stanley of Alderley's Estate*, L. R. 14 Eq. 227, which all proceeded on the principle that only such costs as are specially authorized by the particular Act can be awarded. And see *Re Mouseley's Trust*, 4 K. & J. 86; *Re Burnell's Estate*, 10 Jur. N. S. 1089; *Re Tiverton Market Act*, 26 Beav. 239; *Re Acker's Trust*, 9 Jur. N. S. 224; and see *Ex parte Crober*, 13 Jur. 481; *Ex parte Slater's Devisees*, 5 Rail. Ca. 700; *Ex parte the Rector of Loughton*, 14 Jur. 102; *In re Strachan's Estate*, 9 Ha. 185; *Re Laverick*, 18 Jur. 304. As to payment out of the fund in Court, of such costs as the purchasers under a private Act are not liable to pay, see *Ex parte Pasmore*, *Ex parte Layfield*, *Ex parte Towgood*, *Re London Bridge Acts*, 1 Y. & C. 75, 79, 588; *Re the Bishop of Salisbury*, 16 L. T. 122. Where a private Act omitted to provide for the costs consequent on payment of the money into Court by reason of the title being doubtful, the Court refused to throw such costs on a public body purchasing under the Act: *Ex parte Angell*, *Re Trinity House Lighthouse Act*, 4 Y. & C. 496. As to costs where old companies are amalgamated under an Act embodying the general Act: *Ex parte Eton College*, 15 Jur. 45, C.; 20 L. J. 1; *Re Bristol Dock Co.*, 21 L. T. 17; *Re Ellison*, 1 Jur. N. S. 1155; but see *contrà*, *Re Holden*, 11 Jur. N. S. 995; *Re Neachell*, 25 L. T. 280. And see generally as to costs under similar private Acts, Seton, 1089, and as to costs under Defence Acts, *ib.* 1092.

(*p*) *Gould* v. *Staffordshire, &c., Waterworks Co.*, 5 Exch. 214; 1 Pr. R. 264.

(*q*) 32 Vict. c. 18, sect. 1. And see the 3rd section as to compensation for lands in Westminster, which is now to be settled by the high bailiff, or his deputy. And see 30 & 31 Vict. c. 127, s. 37.

(*r*) Sug. 555; *Jones* v. *Lewis*, 1 De G. & S. 245; 11 Jur. 511; and *vide suprà*, Ch. XII. sect. 1.

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penses when estate is incumbered, &c.

not universally (s), require the vendor to get in, at his own expense, outstanding estates or incumbrances, by deeds distinct from the conveyance: or, if that course be not adopted, he may require him to bear the increased expense occasioned by the concurrence of trustees and incumbrancers in the conveyance. When, upon a large transaction, an estate was subject to incumbrances, which, to save expense, were got in by separate deeds, and paid off out of the purchase-money, the Court considered that the purchaser should have insisted upon the vendor preparing the deeds, and furnishing an abstract of them; (delaying the execution of them, it is presumed, until such abstract was approved and the engrossed deeds themselves were examined by the purchaser;) and that the latter, having laid the drafts of these deeds before counsel to peruse and settle on his behalf, could not throw the expenses upon parties who were liable to pay his costs properly incurred (t). But such a requisition in ordinary cases, where the expense is inconsiderable, is unusual in practice, and is generally regarded as vexatious.

But not if purchaser keep incumbrances on foot as a protection.

If, however, a purchaser keep incumbrances on foot for his own protection (which he has a right to do, even where the contract is for the sale of the estate free from incumbrances (u)) he cannot throw upon the vendor the costs of the necessary assignment; whether the same be effected by the principal conveyance or by a collateral deed (x).

If a solicitor, without special instructions, prepare the conveyance during the existence of a known impediment to completion, upon which the matter eventually goes off, he ordinarily cannot claim the costs of the conveyance (y).

Trustee acting as solicitor can

If a solicitor, who is either alone or jointly with others a trustee for sale, acts professionally in the sale, he can in

(s) *Reeves* v. *Gill*, 1 Beav. 375; and see note to 9 Jarm. Conv. by S. 30.

(t) *Jones* v. *Lewis*, *ubi suprà.*

(u) *Cooper* v. *Cartwright*, Johns. 679.

(x) *Ib.*

(y) *Potts* v. *Dutton*, 8 Beav. 493.

strictness charge only costs out of pocket (*z*); and if he procure another solicitor to transact the business on agency terms, the benefit thus secured will enure to the trust estate (*a*); and if the trustee is in partnership the same disability to make a profit out of the trust attaches to the firm. Under the Bankruptcy Act, 1869, the trustee of the bankrupt's property may not, without the consent of the committee of inspection, employ a solicitor or other agent; but if he be himself a solicitor, he may contract to be paid a certain sum by way of per-centage or otherwise, as remuneration for his professional and other services as trustee (*b*).

only charge costs incurred.

Taxation of conveyancing costs under 6 & 7 Vict. c. 73, s. 36.

And we may here refer to the 6 & 7 Vict. c. 73, by which a solicitor's bill of costs (*c*), although composed entirely of conveyancing charges, may be referred for taxation upon petition presented either to the Lord Chancellor or the Master of the Rolls. The order upon a petition presented within twelve months after delivery but before payment of the bill is of course (*d*); although part of the items be covered by a special agreement (*e*), or although the application be made by a third party liable to pay (*f*); and may be made by a Vice-Chancellor (*g*): but after twelve months from delivery, taxation will be ordered only under special circumstances (*h*). So, under special circumstances (*i*), the

(*z*) *Suprà*, p. 86.

(*a*) *Re Taylor*, 18 Beav. 165.

(*b*) 32 & 33 Vict. c. 71, sect. 29.

(*c*) See sect. 36; and see, for fuller information, an article in 15 Jur., pt. 2, p. 379; and as to costs in respect of business done while the solicitor is uncertificated, see sect. 26, and *Re Jones*, L. R. 9 Eq. 63.

(*d*) See *In re Gaitskell*, 1 Phil. 576; *In re Pender*, 2 Phil. 73; *In re Steele*, 20 L. J. 562, M. R.: want of signature by the solicitor is immaterial on an application by the client for taxation, *S. C.*, *ib.* 69; *In re Gedye*, 14 Beav. 56: as to the principle on which a bill will be taxed, see *Cooper* v. *Ewart*, 2 Phil. 362; *In re Smith*, 9 Beav. 182; and where additional costs are added, and items disallowed, see *Re Reuben Hartley*, 2 Jur. N. S. 449.

(*e*) *In re Eyre*, 2 Phil. 367; *Re Mackrill*, 11 Beav. 42; and see also *Re Rhodes*, 8 Beav. 224; *Re Thompson*, *ib.* 237; and *Re Whitcombe*, *ib.* 121, 140.

(*f*) *In re Bracey*, 8 Beav. 338.

(*g*) See *In re Carew*, 8 Beav. 128; *In re Howard*, *ib.* 424.

(*h*) *In re Bush*, 8 Beav. 66; *In re Harper* v. *Jones*, 10 Beav. 284; *In re Gedye*, 14 Beav. 56; *In re Bagshawe*, 2 De G. & S. 205.

(*i*) As to which see *In re Drake*, 8 Beav. 123; *In re Wells*, *ib.* 416; *In re*

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bill may be referred at any time within, but not after, twelve months *after payment* (*j*).

Such special circumstances are usually pressure by the solicitor (*k*); as when immediate payment is required at a time when delay in completing the business would seriously inconvenience the client (*l*); and secondly, error or overcharge in the bills. The overcharges may be such as of themselves to afford evidence of fraud, or quasi fraud,—as when they are in respect of business which, in the exercise of an honest and fair discretion, ought not to have been transacted (*m*)—and then very slight if any evidence of pressure is necessary to induce an order for taxation (*n*); but mere overcharge, unless of so gross a character as to be tantamount to fraud, is in itself insufficient (*o*), even

Bennett, *ib.* 467; *In re Jones*, *ib.* 479; *In re Fyson*, 9 Beav. 117; *In re Colquhoun*, *ib.* 146; *In re Currie*, *ib.* 602; *In re Neate*, 10 Beav. 181; *In re Drew*, 10 Beav. 368; *In re Bagshawe*, 2 De G. & S. 205; *In re Gedye*, 14 Beav. 56; *In re Williams*, 15 Beav. 417; *In re Barnard*, 2 De G. M. & G. 359; *Ex parte Barton*, 4 De G. M. & G. 112; *Re Cuttin*, 18 Beav. 508; *Re Rance*, 22 Beav. 177.

(*j*). See sect. 41; *In re Massey*, 8 Beav. 458; *Re Harper and Jones*, 10 Beav. 284, 290; *Re Rees*, 12 Beav. 256; but the Court, under its general jurisdiction, will enforce with costs a solicitor's undertaking to deliver his bill, although more than twelve months have elapsed since payment, it having been paid on the faith of such undertaking: *In re Foljambe*, 9 Beav. 402; see *In re Ker*, 12 Beav. 390. But the cases of taxation after payment are not to be extended; and an unexplained delay of nine months after payment in presenting the petition has been held fatal to the application. See *Re Browne*, 15 Beav. 61; 1 De G. M. & G. 322. And see as to mode of enforcing delivery, *Ex parte Bilton*, 25 Beav. 368.

(*k*) *Re Browne*, 15 Beav. 63; 1 De G. M. & G. 322.

(*l*) See *Ex parte Wilkinson*, 2 Coll. 92; *In re Tryon*, 7 Beav. 496; see also *In re Jones*, 8 Beav. 479; *In re Harrison*, 10 Beav. 57; *In re Elmslie*, 12 Beav. 538; *In re Blackmore*, 13 Beav. 154.

(*m*) *In re Barrow*, 17 Beav. 547, 557.

(*n*) *In re Harding*, 10 Beav. 250, 252; *In re Sladden*, 10 Beav. 488; *In re Welchman*, 11 Beav. 319; *In re Hubbard*, 15 Beav. 251.

(*o*) *In re Stirke*, 11 Beav. 304; *In re Walsh*, 12 Beav. 490: specific items of overcharge must be alleged and proved, *In re Thompson*, 8 Beav. 237; *In re Vardy*, 20 L. J., Ch. 325, M. R.; *In re Browne*, 15 Beav. 61; see *S. C.*, 1 De G. M. & G. 331, *et* 333; *In re Foster*, 2 De G. F. & Jo. 105; *et quære In re Williams*, 15 Beav. 417. See, however, *Re Dickson*, 8 Jur. N. S. 29, where an order of V.-C. Wood, directing taxation after payment was affirmed by the Court of Appeal (*dubitante* L. J. Knight Bruce) although no case of fraud or very gross overcharge was made out, but the clients were executors who

although the bill was paid under protest (*p*): so, where the bill has been paid, it has been held, that pressure alone is insufficient, unless accompanied by overcharge (*q*): but, before payment, pressure alone without overcharge, or gross overcharge alone without pressure, will constitute special circumstances, so as to re-open the question of taxation; nor is it necessary to show want of knowledge in the client, or previous opportunity for taxation (*r*).

Giving security equivalent to payment.

Giving security seems to be equivalent to payment (*s*): but mere retention of the amount of the bill out of moneys in the hands of the solicitor does not amount to payment, unless there is also a settlement of account (*t*): nor does a settlement by way of compromise, if effected under pressure (*u*), oust the jurisdiction (*x*); but the order must, in any case after payment, be obtained specially (*y*). The Court, however, upon a petition under the Act, can only ascertain by the ordinary rules of practice the amount payable: and cannot determine whether, prior to the business being done, any special agreement existed as to the manner in which the costs were to be charged, or the mode by which the amount should be ascertained (*z*); or in any way

ought not to be charged more than they would be allowed in passing their accounts in an administration suit. As to what charges are allowed for abstracts, *vide suprà*, p. 304, n.

(*p*) *In re Stirke*, *ubi suprà*; *In re Welchman*, 11 Beav. 319; *In re Harrison*, 10 Beav. 57; *In re Browne*, 15 Beav. 61: as to the meaning of the words "under protest," see 8 Beav. 462; but see *contrà* at Law, *In re Deardon*, 17 Jur. 993.

(*q*) *In re Hubbard*, 15 Beav. 251; *In re Finch*, 16 Beav. 585; 4 De G. M. & G. 108; *In re Bayley*, 18 Beav. 415; *In re Abbott*, 18 Beav. 393.

(*r*) *Re Strother*, 3 K. & Jo. 518, 527, 528.

(*s*) *Re Boyle*, 23 L. T. 262; 5 De G. M. & G. 540.

(*t*) See *In re Cattlin*, 8 Beav. 121; *In re Bignold*, 9 Beav. 270; *In re Steele*, 20 L. J. 562, M. R., *In re Hunt*, 18 L. T. 82: and, as to payment by a promissory note, see *Sayer* v. *Wagstaff*, 5 Beav. 415; *In re Currie*, 9 Beav. 602; see also *Re Harper and Jones*, 10 Beav. 284.

(*u*) *Aliter*, if no pressure, *Stedman* v. *Collett*, 17 Beav. 608.

(*x*) *In re Stephen*, 2 Phil. 562; see *In re Whitcombe*, 8 Beav. 140.

(*y*) *In re Hunt*, 18 L. T. 82, M. R.; *In re Winterbottom*, 15 Beav. 80.

(*z*) *In re Rhodes*, 8 Beav. 224; see 2 Ph. 575; and see *In re Thompson*, 8 Beav. 237; *In re Beale*, 11 Beav. 600; *Foley* v. *Smith*, 20 L. J. 621, M. R.; *In re Moss*, 17 Beav. 340.

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interfere with such special agreement (*a*): but an improper agreement will not preclude taxation (*b*).

"Third party" clause.

Under the 38th section, the right of referring the bill is given, not only to the immediate client, but also to any persons who, as between themselves and such client, may be liable to payment: but, in such a case, the bill must be taxed as between the solicitor and his immediate client (*c*); so that if a purchaser has agreed to pay the vendor's costs, the vendor's solicitor, upon taxation on the petition of the purchaser, will be allowed costs properly incurred as between himself and the vendor, although they may have been improperly incurred as between the vendor and the purchaser: so also, as in an ordinary case, special circumstances must be proved if the bill has been paid, although the payment were by the immediate client (*d*); and the lapse of twelve months since payment precludes taxation under the Act (*e*); and a bill cannot be taxed at the instance of a person who, under no previous liability, voluntarily pays it (*f*). A bill when delivered is *primâ facie* binding on the solicitor for the purposes of taxation: and he is not entitled, as of course, either on the one hand to reduce the demand (*g*); or on the other, to increase the rate of charges (*h*); but he may obtain leave to carry in an additional bill of items accidentally omitted (*i*). Where all the papers had been handed over, and the solicitor swore that he had no documents or memoranda from which he could make out a bill, the Court refused to order its delivery (*k*). It has been held, that under this Act a country solicitor can procure the taxation of the charges of his town agent (*l*): but it does not authorize the

(*a*) Seton, 833.

(*b*) *Re Ingle*, 21 Beav. 275.

(*c*) See *In re Jones*, 8 Beav. 479; *In re Fyson*, 9 Beav. 117; *In re Bignold*, 9 Beav. 269; *In re Harrison*, 10 Beav. 57; *In re Blackmore*, 13 Beav. 154.

(*d*) *In re Bennett*, 8 Beav. 467.

(*e*) *In re Downes*, 5 Beav. 425; *In re Massey*, 8 Beav. 458; *In re Rees*, 12 Beav. 256.

(*f*) *Re Becke and Flower*, 5 Beav. 406.

(*g*) *In re Carven*, 8 Beav. 436.

(*h*) *S. C.*, and *In re Wells*, *ib.* 416; *In re Walters*, 9 Beav. 299.

(*i*) *In re Walters*, *ubi suprà*.

(*k*) *In re Ker*, 12 Beav. 390.

(*l*) *Smith* v. *Dimes*, 13 Jur., Exch. 518; and see Morgan & Davey on Costs, 305, *et seq.*

taxation of the fees of the steward of a manor, (who is a solicitor,) in respect of matters in which he acts only as a steward (*m*). Interest, it appears, will not be allowed upon costs while under taxation (*n*).

Where solicitor, being trustee, pays his own bill.

Where the solicitor avails himself of some special fiduciary relation in which he stands to his client to pay his own bill of costs out of his client's moneys, which may happen to be in his hands, the lapse of time which in an ordinary case would be sufficient, will not, it seems, bar the client's right to have the bill taxed. Thus, where a solicitor, in his capacity of executor, retained the whole amount of his bill for professional services rendered to his testator out of his client's assets, it was held, in a suit for the administration of the testator's estate, twenty-six years after his death, that the parties beneficially interested were entitled to question the amount of the bill of costs; and the taxing master was directed to state whether any of the items objected to were fair and proper to be allowed, and to what amount (*o*).

Taxation under general jurisdiction if solicitor claim lien on papers.

And the Court may, under its general jurisdiction, order taxation of a bill consisting wholly or in part of conveyancing costs, if the solicitor refuse to deliver up deeds and papers in his possession except upon payment of the bill (*p*).

Costs of conveyance under 8 & 9 Vict. c. 119, how to be taxed.

The 8 & 9 Vict. c. 119 (*q*), enacts that in taxing any bill for preparing and executing any deed *under that Act*, it shall be lawful for the taxing officer, and he is thereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but *only* the skill and labour employed and responsibility incurred in the preparation thereof: an enactment which in principle is unexceptionable, but in theory throws a most heavy responsibility upon the taxing masters: it is, however, believed

(*m*) *Allen* v. *Aldridge*, 5 Beav. 401.

(*n*) *In re Smith*, 9 Beav. 342.

(*o*) *Allen* v. *Jarvis*, L. R. 4 Ch. Ap. 616.

(*p*) *In re Murray*, 1 Russ. 519; *In re Rice*, 2 Ke. 181.

(*q*) As to which, *vide suprà*, p. 504.

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that their duties under the Act have practically been hitherto far from onerous.

Attorneys and Solicitors' Act, 1870.

By the 33 & 34 Vict. c. 28 (r), a solicitor may fix the amount of his remuneration by agreement with his client, either in respect of past or of future professional services; but if in respect of business done in any action or suit, the agreement must be examined and allowed by the taxing master before payment is made (s). The agreement, unless specially framed for the purpose, excludes any claim of the solicitor for further remuneration (t), and a provision exempting him from liability for professional negligence is made wholly void (u). The Act provides a summary mode for testing the validity or effect of the agreement, and for setting it aside, and for re-opening it after payment in specified cases (x); and except where otherwise provided in the Act, the bill of the solicitor under such an agreement is exempt from taxation (y). The Act also enables a solicitor to take security for his future costs (z), and allows interest to be charged on disbursements by the solicitor, and also on moneys improperly retained by him belonging to his client (a).

Contract with unqualified conveyancer—is void.

Lastly, we may remark that the 41 Geo. III. c. 98, s. 14, imposes a penalty on unqualified persons acting as conveyancers: and that consequently any special contract by such persons for remuneration for their services, is illegal and void (b).

(r) And see 35 & 36 Vict. c. 81.
(s) Sect. 4.
(t) Sect. 6.
(u) Sect. 7.
(x) Sects. 8, 9, and 10.
(y) Sect. 15.
(z) Sect. 16.
(a) Sects. 17 & 18.
(b) *Taylor* v. *Crowland Co.*, 10 Exch. 293.

CHAPTER XIV.

Chap. XIV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE RELATIVE RIGHTS OF VENDOR AND PURCHASER.

1. *Vendor's lien on estate for unpaid purchase-money.*
2. *Whether he has any remedy if estate has been sold at undervalue: or more has been conveyed than was intended.*
3. *His right of pre-emption under Lands Clauses Consolidation Act, 1845.*
4. *His remedies at Law and in Equity on purchaser's covenants.*
5. *Purchaser's remedies on vendor's covenants.*
6. *His remedy in Equity under special circumstances if title defective.*
7. *His right to pay off incumbrances out of purchase-money.*
8. *His remedy in Equity if he buy his own estate, &c.;—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*
9. *His general rights and liabilities under the conveyance.*

Section 1.

Vendor's lien on estate for unpaid purchase-money.

(1.) THE conveyance, if purporting to comprise "all the estate and interest" of a conveying party, will not be restricted in its operation by the circumstance of his having concurred in any particular and specified character (*a*).

Vendor has a lien on estate for unpaid purchase-money.

In the absence, however, of an express agreement, and of those circumstances from which the Court can imply a con-

(*a*) *Drew* v. *Earl of Norbury*, 3 J. & L. 267; *Strong* v. *Hawkes*, 4 De G. M. & G. 186: and see *Johnson* v. *Webster*, 4 De G. M. & G. 488; *Beaumont* v. *Lord Salisbury*, 19 Beav. 198; see, as to general expressions in a decree, *Drought* v. *Jones*, 4 Dru. & W. 174; and *vide supra*, p. 542.

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trary intention, the vendor, notwithstanding the execution of a conveyance containing the above expressions and acknowledging payment of the purchase-money and bearing an indorsed receipt for the amount (*b*), and notwithstanding delivery of possession to the purchaser, retains an equitable lien (*c*) upon the estate, whatever may be its tenure, for so much of the purchase-money as in fact remains unpaid (*d*); and even, it has been held, for further advances made by him to the purchaser, for the purpose of improving the property, but without any agreement in writing (*e*). The lien is valid against volunteers, creditors, (whether claiming under a composition deed or in bankruptcy (*f*),) and sub-purchasers with notice, claiming under the first purchaser (*g*): and a sub-purchaser or mortgagee, even without notice, is postponed; unless he has the legal estate (*h*), or a better equity (*i*), or the title deeds (*k*). It has even been held,

Lien is valid as against whom.

(*b*) *Coppin* v. *Coppin*, 2 P. Wms. 291, 295; *Croly* v. *Callaghan*, 5 Ir. Eq. R. 25; *Hawkins* v. *Gardiner*, 2 Sm. & G. 441; *Winter* v. *Lord Anson*, 3 Russ. 488. Even at Law the *indorsed* receipt is not conclusive evidence of payment, *Straton* v. *Rastall*, 2 T. R. 366. See, as to its effect in Equity, under special circumstances, as tending to mislead one of several joint payers, *West* v. *Jones*, 1 Sim. N. R. 205.

(*c*) As to the mode of enforcing it, see *Rome* v. *Young*, 3 Y. & C. 199. As to the distinction between the vendor's lien and the right of stoppage *in transitu* on a sale of personal chattels, see *M'Ewan* v. *Smith*, 2 H. L. C. 309; and see *Spartali* v. *Benecke*, 10 C. B. 212; *Coventry* v. *Gladstone*, L. R. 4 Eq. 493; and as to the right of stoppage *in transitu*, and the jurisdiction in Equity to enforce it, see *Schotsmans* v. *Lanc. and Yks. R. Co.*, L. R. 2 Ch. Ap. 332; *Berndston* v. *Strang*, L. R. 3 Ch. Ap. 588; and see generally as to the conditions on which the right of stoppage depends, *The Tigris*, 9 Jur. N. S. 361.

(*d*) See *Winter* v. *Lord Anson*, 3 Russ. 488; and see the judgment in *Mackreth* v. *Symmons*, 15 Ves. 336; 1 Wh. & T. L. C. 289 4th Ed., where the earlier cases are cited; and see *Hawkins* v. *Gardiner*, *ubi suprà*.

(*e*) *Ex parte Linden*, 1 M. D. & De G. 428; *sed quære*.

(*f*) See *Fawell* v. *Heelis*, Amb. 724; *Blackburn* v. *Gregson*, 1 Bro. C. C. 420; *Bowles* v. *Rogers*, cited 6 Ves. 95; *Grant* v. *Mills*, 2 Ves. & B. 306, 309.

(*g*) 15 Ves. 337, 341.

(*h*) See *Mackreth* v. *Symmons*, 15 Ves. 329; *Frere* v. *Moore*, 8 Pri. 475.

(*i*) See *Rice* v. *Rice*, 2 Dre. 85.

(*k*) See Sug. 682, citing *Nairn* v. *Prowse*, 6 Ves. 752; *Stanhope* v. *Lord Verney*, 2 Eden, 81; Butler's note to Co. Litt. 290, b.; *Rice* v. *Rice*, 2 Dre. 73, 82: and compare *Perry Herrick* v. *Attwood*, 2 De G. & Jo. 21; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614; *Briggs* v. *Jones*, L. R. 10 Eq. 92. In *Stackhouse* v. *Lady Jersey*, 7 Jur. N. S. 359, the possession of the title deeds was held to give the holder no advan-

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that a sub-purchaser or mortgagee acquiring the legal estate, but neglecting to ask for the deeds, is to be postponed to the original vendor who holds them as a security for his unpaid purchase-money (*l*). But the rule is now well settled that a mortgagee, having the legal estate, is not to be postponed, merely because he has not possessed himself of the title deeds: in order to deprive him of his priority, his non-possession of the deeds must be attributable to his own fraud, or gross negligence (*m*). The mere omission to open a parcel of deeds, which, if opened, would have shown that the later deeds were missing, having been deposited with an equitable mortgagee, has been held insufficient to postpone a legal mortgagee (*n*).

Does not protect title deeds at Law.

But if the vendor, after conveyance, retain the title deeds, the purchaser can recover them at Law, although the purchase-money be unpaid; unless he also retain part of the estate to which they show title, or unless the conveyance were executed as an escrow, to take effect on payment of the money (*o*); which may be shown by parol evidence (*p*).

Is not in nature of an

The lien is a charge, and not in the nature of an express

tage which he could actively assert; and see *Manningford* v. *Poleman*, 1 Coll. 670; *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139; *Heath* v. *Crealock*, L. R. 10 Ch. Ap. 72. But see *Pease* v. *Jackson*, L. R. 3 Ch. Ap. 576; *et vide infrà*, Ch. XV., s. 5, where this subject is more fully considered.

(*l*) *Worthington* v. *Morgan*, 16 Sim. 547; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; and see *Finch* v. *Shaw*, *Colyer* v. *Finch*, 19 Beav. 500; 5 H. L. Ca. 905.

(*m*) *Finch* v. *Shaw*, *Colyer* v. *Finch*, *ubi suprà*; and *vide infrà*, Ch. XV., s. 5, where this subject is more fully considered.

(*n*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652.

(*o*) *Goode* v. *Burton*, 1 Exch. 189; 11 Jur. 851, in which see the remarks made by the Court upon Mr. Justice Holroyd's dictum in *Esdaile* v. *Oxenham*, 3 B. & C. 229. The conveyance of the legal inheritance carries with it the right to the deeds: *Austin* v. *Croome*, 1 Car. & M. 653; *Harrington* v. *Price*, 3 B. & Ad. 170; *Wakefield* v. *Newbon*, 6 Q. B. 276; unless other property held under the same title is retained by the party making the conveyance; *Yea* v. *Field*, 2 T. R. 708; and see 6 Q. B. 446; 37 & 38 Vict. c. 78, s. 2; and *vide suprà*, p. 674. See as to a mortgagee, *Davies* v. *Vernon*, 6 Q. B. 443, 447, which *qy.* As to whether the releasee to uses, or the *cestui que trust* (when a different person) is entitled, see *Reece* v. *Trye*, 1 De G. & S. 273.

(*p*) *Bowker* v. *Burdekin*, 11 M. & W. 128; *Gudgen* v. *Besset*, 3 Jur. N. S. 212.

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express trust, nor within Locke King's Act;

trust" within the 25th sect. of the 3 & 4 Will. IV. c. 27; and is therefore barred by the 40th sect. after twenty years from the day fixed for payment; there having been no interim payment nor written acknowledgment of title (*q*).

but within the Amendment Act.

It was held not to be money charged on land "by way of mortgage" within the meaning of Locke King's Act (*r*), so as to deprive the heir or devisee of the purchaser of his right to have the unpaid purchase-money discharged out of the personal estate (*s*); but by the 30 & 31 Vict. c. 69, the word "mortgage," in the construction of these statutes, has been extended to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a *testator;* and this provision does not appear to be limited to the case of a testator dying after the 31st December, 1867, when the Act came into operation. It was observed in the last edition of this work, that this extended meaning of the word "mortgage" does not apply to lien for unpaid purchase-money upon lands purchased by an *intestate;* and that, in such a case, the heir is still entitled to have the purchase-money satisfied out of the personal estate; and this has since been so decided (*t*). A bequest of "securities for money" has been held not to include the lien (*u*).

Is assignable by parol.

The lien is assignable or chargeable by parol (*x*); but the assignee or incumbrancer takes subject to any prior equitable incumbrances created by the vendor (*u*). Where a vendor, between whom and his purchaser there were unsettled accounts, was allowed to retain the title deeds, and deposited

(*q*) *Toft* v. *Stephenson*, 7 Ha. 1; 5 De G. M. & G. 735, which see as to interest.

(*r*) 17 & 18 Vict. c. 113.

(*s*) *Hood* v. *Hood*, 3 Jur. N. S. 684; and see *Barnwell* v. *Iremonger*, 1 Drew. & Sma. 255, which did not turn on the construction of the Act.

(*t*) *Harding* v. *Harding*, L. R. 13 Eq. 493.

(*u*) *Goold* v. *Teague*, 5 Jur. N. S. 116; *sed quære*.

(*x*) *Dryden* v. *Frost*, 3 Myl. & C. 670; and see *Burn* v. *Carvalho*, 4 Myl. & C. 690; *Rodick* v. *Gandell*, 12 Beav. 325; 1 De G. M. & G. 763, and cases cited; *Ball* v. *L. and N. W. R. Co.*, 15 Beav. 548; *Morrell* v. *Wootton*, 16 Beav. 197; *Biccard* v. *Prichard*, 1 K. & J. 277.

(*y*) *Lacey* v. *Ingle*, 2 Ph. 413; and see *Mangles* v. *Dixon*, 1 Mac. & G. 437; 3 H. L. C. 702.

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them by way of equitable mortgage without notice, and became bankrupt, the equitable mortgage was upheld, to the extent of the unpaid purchase-money, against the purchaser who had not appropriated, in satisfaction of it, a balance which was due to him from the vendor on the unsettled accounts (z).

Is within Mortmain Act.

As we have seen (a), the lien is within the Statute of Charitable Uses; but not within the Judgment Act, 18 & 19 Vict. c. 15 (b).

Marshalling for lien.

And it appears to be the result of the modern authorities (c) that where the vendor's claim is satisfied out of the personal estate of a deceased purchaser, Equity will, by marshalling the purchased estate and the personal estate, give the benefit of the vendor's lien to simple-contract creditors and legatees (d) of the purchaser, if he have died intestate as respects the purchased estate; and to simple-contract creditors (e) if the estate be devised. Whether legatees are entitled to this benefit, if the estate be devised, appears to be still doubtful (f).

Is lost by taking independent security.

When the vendor takes an independent security for payment, this will, as a general (g) but not universal rule (h), be evidence of his intention to abandon the lien: as when he takes a charge upon stock (i), or a mortgage of another estate (k): so taking a mortgage of part of the sold estate is presumably an abandonment of his lien as respects the

(z) *Rayne* v. *Baker*, 1 Gif. 241; and see *Peto* v. *Hammond*, 29 Beav. 91.

(a) *Suprà*, p. 264.

(b) *Vide suprà*, p. 473.

(c) See Sug. 680.

(d) *Trimmer* v. *Bayne*, 9 Ves. 209; see 4 Russ. 339, n.; *Sproule* v. *Prior*, 8 Sim. 189, 193; and see 2 Myl. & K. 645.

(e) *Selby* v. *Selby*, 4 Russ. 336; see earlier cases, cited p. 338.

(f) *Wythe* v. *Henniker*, 2 Myl. & Ke. 635, 645. See *contrà Lord Lilford* v. *Powys-Keck*, L. R. 1 Eq. 347, a case of specific devise; see too *Hensman* v. *Fryer*, L. R. 2 Eq. 627; reversed L. R. 3 Ch. Ap. 420; *Gibbins* v. *Eyden*, L. R. 7 Eq. 371; *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234; compare *Birds* v. *Askey*, 24 Beav. 618.

(g) Sug. 675.

(h) 15 Ves. 348; *Saunders* v. *Leslie*, 2 Ba. & B. 515.

(i) *Nairn* v. *Prowse*, 6 Ves. 752; and see on this case, 1 Wh. & T. L. C. 4th edit. p. 319.

(k) See 6 Ves. 760. In *Dixon* v. *Gayfere*, 1 De G. & Jo. 655, Lord

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residue (*l*): so, if, by agreement with the purchaser, he retains the title deeds and the conveyance as a security for the unpaid purchase-money, he is in the position of an equitable mortgagee, and his ordinary lien is lost (*m*); and taking a mortgage upon the estate for a part only of the unpaid purchase-money, is presumably an abandonment of his lien for the balance (*n*).

But not by taking note, bill, or bond;

But he does not show an intention to abandon his lien by merely taking any document which only evidences, or facilitates enforcement of his claim against the purchaser; *e. g.*, a promissory note or bill of exchange (*o*), or bond (*p*): nor is it material that such document provides for the money remaining unpaid for a specified period, *e. g.*, the life of the vendor (*q*).

although payment agreed to be deferred,

or third parties join in note or bill.

And as promissory notes and bills of exchange are considered merely as modes of payment (*r*), the circumstance of a third person, joining in them as surety, will not, it seems, affect the lien (*s*).

Whether affected by surety joining in bond.

Whether it would be affected by taking a bond or covenant from a third person, is undecided (*t*); but probably such would be the case (*u*).

Whether lost if conveyance

Where the sale was expressed to be made in consideration

Cranworth appears to have thought that the lien is not necessarily lost by taking a real security.

(*l*) *Capper* v. *Spottiswoode*, Taml. 21.

(*m*) See Sugd. 680, and cases there cited.

(*n*) *Bond* v. *Kent*, 2 Vern. 281; a note was given for payment of the balance; and see *Hughes* v. *Kearney*, 1 Sch. & Lef. 132—135; *Eyre* v. *Sadleir*, 14 Ir. Ch. Rep. 119; 15 *ib.* 1.

(*o*) Although it be negotiated, *Ex parte Loaring*, 2 Rose, 79; but see *contrà*, (in the case of goods,) *Bunney* v. *Poyntz*, 1 Nev. & M. 229.

(*p*) *Winter* v. *Lord Anson*, 3 Russ. 488, 490; see 6 Ves. 759.

(*q*) *Winter* v. *Lord Anson*, *ubi suprà*; an appeal against this decision was lodged in the House of Lords, but it was afterwards withdrawn; Sugd. V. & P. 258, 11th edit.

(*r*) 15 Ves. 349: see *Teed* v. *Carruthers*, 2 Y. & C. C. C. 31.

(*s*) *Hughes* v. *Kearney*, 1 Sch. & L. 132, 136; *Grant* v. *Mills*, 2 Ves. & B. 306.

(*t*) 2 Ves. & B. 309.

(*u*) *Cood* v. *Cood*, 9 Price, 544; 10 Price, 109; Sug. 678.

of the purchaser's subsequent covenant to pay an annuity and a gross sum of 3000*l.* in the event of his own marriage, there was held to be no lien for the 3000*l.* (*x*). Upon this decision it may be remarked, that the nature of the consideration and the fact of a covenant being taken, furnished strong arguments in favour of an intention to abandon the lien as respects the 3000*l.*: for the existence of a lien for a gross sum, the payment of which might remain contingent during the life of the purchaser, and which depended upon an event the probabilities of which were not matters of calculation, and which could not have been guarded against by any scheme of insurance, would have left the estate in his hand inalienable except at a most serious sacrifice.

be expressly in consideration of covenant, the sum being payable upon an incalculable contingency.

So, where a daughter, on the eve of marriage, sold to her father her reversion of an estate, and the conveyance was expressed to be in consideration of the sum of 3000*l.* secured to her upon the terms mentioned in a bond of even date, and the indorsed receipt was for "a bond for the sum of 3000*l.*, being the full consideration within expressed to be given;" the bond being in fact for securing to her an annuity of 100*l.* during the joint lives of herself, her husband, and father, and for payment of a sum of 3000*l.* in certain contingencies depending upon lives and the existence of issue, and subject to a proviso avoiding the bond (as regarded the 3000*l.*) in the event of the father by deed or will making a certain specified provision for his daughter or her husband, it was held, that no lien upon the estate was intended to or did exist (*y*).

Or if conveyance be expressly in consideration of a bond.

Both these cases appear to have been rather cases of family arrangement than of ordinary sale and purchase: and they do not seem conclusively to show that the lien would be discharged by the mere fact of the conveyance being expressed to be in consideration of a bond or covenant for payment of a

The doctrine considered.

(*x*) *Clarke* v. *Royle*, 3 Sim. 499; and see *Stuart* v. *Ferguson*, 1 Hayes, 452, 467; and *Frail* v. *Ellis*, 16 Beav. 350.

(*y*) *Parrott* v. *Sweetland*, 3 Myl. & K. 655; and see *Dyke* v. *Rendall*, 2 De G. M. & G. 209.

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Calculable and incalculable contingencies.

gross sum in all events; the sum being in fact so made payable. They may, however, perhaps, induce a doubt whether *Winter* v. *Lord Anson* (z) would be an authority for the existence of the lien where a vendor takes a bond for a future consideration, payable upon incalculable contingencies: thus distinguishing such a case from those where the consideration is payable upon a calculable contingency; where it appears, judging by those cases upon sales in consideration of an annuity next adverted to, that taking a bond or covenant for its payment would not affect the lien.

Lien for annuity consideration, is not affected by bond;

For the authorities show, that, in the absence of special circumstances (a), a vendor selling in consideration of even a life annuity, retains a lien upon the estate, although he take a bond or covenant for payment: this was decided in *Tardiffe* v. *Scrughan* (b); a case which, although it has been doubted (c), is considered by Lord St. Leonards to be an authority (d); and his opinion has been followed by Sir James Wigram, V.-C. (e), who, however, partly grounded his decision upon the fact of the purchaser having covenanted with the vendor to uphold the property; but the authority of *Tardiffe* v. *Scrughan* is now undisputed.

except under special circumstances.

Where, however, from the form of the transaction, or other circumstances, it appears that the bond or covenant is in fact given in substitution for the consideration money, the lien is lost. Thus, where an equity of redemption was sold in consideration of two annuities, which were granted and covenanted to be paid by a deed of even date with the conveyance, and the conveyance was expressed to be made by the mortgagor and mortgagee in consideration of the annuities having been so granted, and of the mortgage debt having been paid by the purchaser, it was held, that the

(z) 3 Russ. 488.

(a) As to which see *Dixon* v. *Gayfere*, 21 Beav. 118; 1 De G. & Jo. 655; and *vide infrà*.

(b) Cited 1 Bro. C. C. 423.

(c) See 15 Ves. 352; 3 Sim. 502; but see 13 Sim. 512.

(d) *Richardson* v. *M'Causland*, Beat. 457, 460; Sug. 676.

(e) *Matthew* v. *Bowler*, 6 Ha. 110.

circumstance of the separate deed being taken as a security for the annuities, and the mode in which the consideration was stated in the conveyance, evidenced an intention that there should be no lien (*f*).

Whether affected by bond in case of sale of reversion.

So, where a reversion was sold in consideration of immediate life annuities, which were secured by bond, Lord Eldon, looking to the nature of the estate, and the fact of a bond being taken, held, that there was no lien: the annuities might all determine before the reversion fell into possession; and this, coupled with the fact of the vendor taking the bond, showed that he did not intend the lien to subsist (*g*): but there were special circumstances in this case, which showed an intention on the vendor's part to rely merely on the personal security; and it cannot be (as it has sometimes been), regarded as an authority for the proposition that there can be no lien where the estate is sold in consideration of an annuity, secured by a bond or covenant (*h*).

Lien waived by special terms of contract.

In a modern case, where the contract was to sell in consideration of an annuity for three lives payable quarterly, and "to be secured by bond," it was held, that the land was free; though the vendor was entitled to have the annuity secured by a bond, before he could be called on to convey the estate. The Court did not dispute the authority of *Winter* v. *Lord Anson*; but considered that the terms of the contract, and the circumstance that the existence of such an annuity as a charge upon the property would have seriously interfered with alienation, rebutted the general presumption (*i*).

Where purchase-money

Where the purchase-money was payable by instalments,

(*f*) *Buckland* v. *Pocknell*, 13 Sim. 406; and see *Frail* v. *Ellis*, 16 Beav. 350.

(*g*) See *Mackreth* v. *Symmons*, 15 Ves. 351; and see generally on the subject of vendor's lien the notes on case in Wh. & T. L. C., vol. i. p. 289, 4th edit.

(*h*) See Sug. V. & P. 869, 11th ed., and see 14th ed., p. 676, note.

(*i*) *Dixon* v. *Gayfere*, 21 Beav. 118; 1 De G. & Jo. 655, and see and consider judgment. See also *Dyke* v. *Rendall*, 2 De G. M. & G. 209.

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which were secured by a contemporaneous bond, the lien was not lost (*k*).

payable by instalments secured by a bond, lien not lost.

Lien may subsist as to only part of money.

Lord Eldon decided (*l*), that the nature of the transaction may show that the lien is to subsist as to part of the unpaid purchase-money, but not as to the residue.

Presumable intention either way may be rebutted.

And as taking a substantive and independent security destroys the lien, not by virtue of any technical rule, but merely by indicating the intention of the vendor, the lien may, notwithstanding the security, be preserved, either by express agreement, or by any expressions negativing the presumable intention to abandon it (*m*); *e. g.*, a stipulation that the estate shall not be sold until the money is paid, or unless with the consent of the vendor and the surety (*n*); or by parol evidence negativing such presumable intention (*o*): and this, although such intention be collected from the terms in which the consideration is stated on the face of the conveyance, and acknowledged in the indorsed receipt (*o*). And, on the other hand, the intention to abandon the lien, in cases where only a note or bond is taken, may be evidenced by a parol express agreement (*p*); or by expressions inconsistent with its continuance; *e. g.*, expressions referring to a re-sale of the property before the time fixed for payment of the amount due to the vendor (*q*): and the same would no doubt be the rule in a case where no security was taken.

Not lost by unauthorised payment to

The lien is not lost by an unauthorised or improper payment to the vendor's agent (*r*).

Lien, how lost as against third parties.

Where a vendor joined in a deed by which the purchaser

(*k*) *Collins* v. *Collins*, 31 Beav. 346.

(*l*) *Mackreth* v. *Symmons*, 15 Ves. 351; 1 Wh. & T. L. Ca. 4th edit., 289.

(*m*) See *Austen* v. *Halsey*, 6 Ves. 475, 483.

(*n*) *Elliot* v. *Edwards*, 3 Bos. & P. 181.

(*o*) *Frail* v. *Ellis*, 16 Beav. 350.

(*p*) 1 Sim & St. 445.

(*q*) See *Ex parte Parkes*, 1 G. & J. 228.

(*r*) *Wrout* v. *Dawes*, 25 Beav. 369; and see *Wilson* v. *Keating*, 5 Jur. N. S. 815.

mortgaged the estate to a third party, who advanced part of the purchase-money, he, of course, was held to have, as against such mortgagee, no lien for the unpaid balance (s): so, where a vendor, without receiving the purchase-money, signed the conveyance for the purpose of enabling the purchaser to execute a mortgage, he was held to have no lien as against the mortgagee (t): so, where, upon a purchase by trustees, the vendor, knowing the money to be trust money, signed the usual indorsed receipt, but allowed part of it to remain in the hands of one of the trustees without the knowledge of his co-trustees, or *cestuis que trust*, he was held to have no lien (u). So, where a trustee purchased on behalf of his *cestui que trust*, and the recitals of the conveyance disclosed the trust, and contained a statement that a sufficient portion of the trust funds had been called in to provide the purchase-money, for the whole of which there was an indorsed receipt, the real fact being that part of the price was contributed by the trustee personally, and was secured by his bond and a deposit of the title deeds with the vendor, it was held that the latter had no lien on the deeds for the balance due to him (x).

None implied in favour of disqualified parties.

And no lien will be assumed in favour of parties who are, by law, disqualified from holding such an interest in real estate (y).

Lien merely equitable: vendor cannot at once sue at Law and in Equity.

A vendor's lien can be enforced only by suit in Equity; and he cannot, at the same time, sue in Equity, and bring an action at Law upon any bond or other security which he may have taken for payment of the money: but if he fail in one remedy he may resort to the other (z).

Is a protection against purchaser's

Where prior to the 27 & 28 Vict. c. 112 the vendor conveyed the estate to the purchaser, and took a re-conveyance, by way of mortgage, for securing payment of

(s) *Cood* v. *Pollard*, 9 Pri. 544.

(t) *Smith* v. *Evans*, 28 Beav. 59.

(u) *White* v. *Wakefield*, 7 Sim. 401; and see *Price* v. *Blakemore*, 6 Beav. 507.

Muir v. *Jolly*, 26 Beav. 143.

(y) *Suprà*, p. 440.

(z) *Barker* v. *Smark*, 3 Beav. 64.

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judgment creditors,—when.

part of the purchase-money, his lien appeared to render the security unimpeachable by judgment creditors of the purchaser: but the validity, as against such creditors, of powers of sale and leasing, and other special powers in the mortgage, probably depended upon their having been stipulated for, as part of the agreement for sale, or if subsequently thereto, then prior to the judgments becoming a charge. Even when the conveyance and mortgage were embodied in the same instrument, which in that case sometimes took the form of a covenant by the vendor to convey on payment of the balance, the validity of the powers would seem to have depended upon either their having been previously stipulated for as above suggested, or upon the fact of the vendor having taken them as part of his security without notice of the judgments being a charge on the land; which want of notice, if he came to exercise the powers, he could never conclusively prove as against an intending purchaser or lessee. The only safe course was to bargain in the original contract of sale for the insertion of the powers.

Where a purchaser paid part of his purchase-money, and was let into possession, but took no conveyance, and the vendor obtained a decree for sale, it was held, that a purchaser under the decree was not compellable to complete without the concurrence of the registered judgment creditors of the original purchaser, who were not parties to the suit, and whose judgments were prior to the decree (*a*).

Vendor has no claim for miscalculated interest.

A vendor, having given the usual release in the body of the conveyance for the purchase-money, cannot bring an action for interest which, through an error of calculation, has been omitted to be paid (*b*): but an action lies on an I O U given for purchase-money contemporaneously with the execution of the conveyance which, in the usual way, recites payment and releases the purchaser (*c*).

Can sue on I O U.

(*a*) *Re Governors of Grey-coat Hospital* v. *Westminster Imp. Commrs.*, 1 De G. & Jo. 531; and see *Knight* v. *Pocock*, 24 Beav. 436.

(*b*) *Harding* v. *Ambler*, 3 M. & W. 279.

(*c*) *Berry* v. *Storey*, 2 C. L. R. 815.

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Illegal contract.

Where the original contract is tainted with illegality, this is a defence to an action by the vendor upon any security which may have been given for the balance of the purchase-money (*d*).

Vendor's lien for unpaid purchase-money on sale to a railway company.

We have already seen that the vendor to a railway company has no lien for his unpaid purchase-money upon the moneys deposited in Court under the Lands Clauses Consolidation Act (*e*): he has, however, the ordinary vendor's lien upon the land taken, in respect not only of unpaid purchase-money, but also of compensation for consequential damage (*f*); unless such compensation is the subject of a separate agreement between him and the company (*g*); and notwithstanding that the railway is actually made and ready, or even open, for traffic, he may, in default of payment, obtain an order for sale of the land (*h*): but the lien must be first declared by a decree of the Court (*i*); and the fact of a deposit and bond having been made under the 85th section, does not prejudice his lien for the excess of the purchase and compensation moneys over the sum deposited (*k*). It would seem that he cannot, upon an interlocutory application, restrain the company by injunction from using the land for the purposes of their undertaking; except perhaps where they are destroying the property, and irremediable damage is likely to ensue (*l*): but, in one case, where a decree was

(*d*) *Fisher* v. *Bridges*, 3 El. & B. 642. As to illegal agreements, *vide suprà*, p. 239.

(*e*) *Vide suprà*, p. 713.

(*f*) *Walker* v. *Ware Hadham, and Buntingford R. Co.*, L. R. 1 Eq. 195; 35 Beav. 52.

(*g*) *Ibid.*

(*h*) *Wing* v. *Tottenham and Hampstead Jn. R. Co.*, L. R. 3 Ch. Ap. 740; *Walker* v. *Ware, Hadham and Buntingford R. Co.*, *ubi suprà*; where the line was actually opened for public use.

(*i*) *Att.-Gen.* v. *Sittingbourne and Sheerness R. Co.*, L. R. 1 Eq. 636; and see *Bishop of Winchester* v. *Mid Hants R. Co.*, L. R. 5 Eq. 17, where the lien was enforced against the lessees of the purchasing company.

(*k*) *Walker* v. *Ware, &c., R. Co. ubi suprà.*

(*l*) *Pell* v. *Northampton and Banbury Jn. R. Co.*, L. R. 2 Eq. 100; *Munns* v. *Isle of Wight R. Co.*, L. R. 5 Ch. Ap. 414, reversing V.-C. J., L. R. 8 Eq. 653; *Lycett* v. *Stafford and Uttoxeter R. Co.*, L. R. 13 Eq. 261; and see *Cosens* v. *The Bognor R. Co.*, L. R. 1 Ch. Ap. 594, where on appeal an order of the M. R. granting an injunction was affirmed, *dissentiente*, Turner, L. J.; and *Earl St. Germains* v. *Crystal Palace R. Co.*

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made against the company for specific performance of the contract, and for payment of the purchase-money within a limited period, leave was granted to the plaintiff to apply for an injunction in default of payment (m): and it seems clear that in such a case the landowner is entitled to have a receiver appointed (n).

The lien does not extend to the costs of the arbitration under which the price has been ascertained (o); and it has been held that on a sale to a public company in consideration of a yearly rent-charge, the vendor has no lien (p); the ground of the decision being that in such a case it cannot be supposed to have been the intention of the parties that the vendor was to reserve to himself a right at some future time to enter and destroy a public work, if the annual rent should fall into arrear (q).

Section 2.

(2.) *Whether the vendor has any remedy if the estate has been sold at an undervalue;—or more has been conveyed than was intended.*

Vendor has no claim in respect of mistake as to extent or value of the property,

The vendor, after conveyance, has no remedy, if the property prove to be, as respects either quantity or quality, more valuable than was imagined: for instance, where the residue of a lease, of which twenty years were in fact unexpired, was sold under the impression that only eight years were to run, and the price was fixed on that supposition, the vendors, although trustees, were held bound by the conveyance: Lord Cottenham, in affirming the decree of V.-C. K. Bruce dismissing the vendor's bill, observed, "Suppose a

L. R. 11 Eq. 563, which on this point seem to be now over-ruled.

(m) *Bishop of Winchester* v. *Mid Hants R. Co.*, L. R. 5 Eq. 17.

(n) *Bishop of Winchester* v. *Mid Hants R. Co.*, *ubi suprà*; but see *Pell* v. *Northampton and Banbury Jn. R. Co.*, *ubi suprà*, where Turner, L. J., seems to have had some doubt upon the point. See as to appointment of a receiver against a railway company, 30 & 31 Vict. c. 127, s. 4; 31 & 32 Vict. c. 79.

(o) *Earl Ferrers* v. *Stafford and Uttoxeter R. Co.*, L. R., 13 Eq. 524.

(p) *Earl of Jersey* v. *Briton Ferry Floating Dock Co.*, L. R. 7 Eq. 409.

(q) *Ib.* 413.

party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition; but it afterwards turned out to be 250 acres, could he afterwards come and ask for a re-conveyance of the farm or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or larger acreage is immaterial" (*r*).

or the extent of his interest therein.

Nor, where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards heard to say that he was under a misapprehension as to the extent of his interest in the property (*s*). In one case where a woman, who had a life interest settled to her separate use, joined with her supposed husband (who was in fact married to another woman) in assigning it to a purchaser, she was held bound by the assignment (*t*): but in this case it is difficult to see how any fair question could be raised; since the woman assigned the property not *quâ* a feme covert, but as being, in regard thereto, a feme sole, in contemplation of a court of equity.

And, in the absence of express qualifying words, it will be presumed that each conveying party intended to pass all his different rights and interest in the property. But in one case (*u*), where a vendor was beneficially interested in one share, and was also trustee of another share, it was held by the House of Lords that the purchaser did not acquire the legal estate in the latter share, notwithstanding that the *cestui que trust* joined in the conveyance for the purpose of passing the beneficial interest; but this decision has been universally disapproved (*x*).

(*r*) *Okill* v. *Whittaker*, 2 Ph. 338; 1 De G. & Sm. 83.

(*s*) *Malden* v. *Merick* or *Menil*, 2 Atk. 8; *Marshall* v. *Collett*, 1 Y. & C. 232; *Malcolm* v. *Charlesworth*, 1 Ke. 63; *Evans* v. *Jones*, Kay, 29; and see also *Horne* v. *Barton*, 8 Jur. N. S. 1032.

(*t*) *Sturge* v. *Starr*, 2 Myl. & Ke. 195.

(*u*) *Faussett* v. *Carpenter*, 2 Dow. & Cla. 232.

(*x*) See *Carter* v. *Carter*, 3 K. & Jo. 635; Sug. 743.

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Nor in respect of price paid to another, at his request.

And where the owner of an estate has sold and conveyed it in consideration of the purchase-money being, at his request, paid to a third person, he cannot afterwards impeach the sale upon the ground of such person having exercised undue influence over him:—unless he can clearly fix the purchaser with a *quasi*-fraudulent knowledge of such being the case (*y*).

Aliter, if property not intended to be dealt with is conveyed.

But the above cases must be distinguished from those where the conveyance, by mistake, comprises more than *either* party intended to deal with (*z*): as where, upon a contract for sale of farm A., the conveyance by mistake includes lands parcel of farm B.; or where the plan on the deed comprises more land than was intended to be conveyed (*a*); or where the words of conveyance are more comprehensive than the recitals as to the property to be conveyed (*b*); or where a clause is accidentally inserted in the deed contrary to the agreement (*c*): and if, in any other respect, the deed fails to carry out that which is proved to have been the common intention of all material parties, a Court of Equity will rectify the error (*d*); but the mistake must, as a rule, be mutual (*e*), and must be clearly proved (*f*); and the extent of the proposed alteration should be ascertained by evidence contemporaneous with, or anterior to, the deed (*g*).

(*y*) See and consider *Blackie* v. *Clark*, 15 Beav. 595, 601.

(*z*) *Tyler* v. *Beversham*, Rep. t. Finch, 80; *Thomas* v. *Davis*, 1 Dick. 301; see *Beaumont* v. *Bramley*, Turn. & R. 41; *Marquess* v. *Marchioness of Exeter*, 3 Myl. & C. 321; *Mortimer* v. *Shortall*, 2 Dru. & W. 363.

(*a*) *Harris* v. *Pepperell*, L. R. 5 Eq. 1.

(*b*) *Jenner* v. *Jenner*, L. R. 1 Eq. 361; and see *Rooke* v. *Lord Kensington*, 2 K. & J. 753.

(*c*) *Rob* v. *Butterwick*, 2 Pri. 190.

(*d*) *Wright* v. *Goff*, 22 Beav. 207.

(*e*) *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431; but see *Garrard* v. *Frankel*, *ib.*, 445; and see *Harris* v. *Pepperell*, L. R. 5 Eq. 1, where the Court rectified the vendor's error, giving the purchaser the option of declining the purchase; see too *Bloomer* v. *Spittle*, L. R. 13 Eq. 427, where after the time which had elapsed the Court declined to rectify the deed, but gave the plaintiff (the purchaser) the option of dismissing his bill without costs, if the defendants would not rectify the deed.

(*f*) *Marquis of Breadalbane* v. *Marquis of Chandos*, 2 M. & Cr. 711.

(*g*) *Earl of Bradford* v. *Earl of Romney*, 30 Beav. 431; and see *Wilkinson* v. *Nelson*, 7 Jur. N. S. 480.

In a modern case at Law, where A., being seised in fee of an undivided moiety of a messuage, and having a lease of the other moiety with a covenant not to assign without licence, after reciting that he was seised in fee of the entirety, granted to B., by way of mortgage, all his estate and interest in the messuage, and by the same deed assigned other leasehold property of which he was possessed, it was held that only the moiety of which he was seised in fee passed by the deed (h). Stress was laid on the fact that the deed was only a security for a debt, and not an absolute purchase; but the only sufficient ground, if it be one, for the decision was that if the leasehold moiety had been held to pass there would have been a forfeiture. No doubt the fact of part of the messuage being held under a lease was overlooked, and it was the intention of both parties that the whole should be included in the deed. The covenant in the lease was against assignment only; and if the question had come before a Court of Equity, the mortgagee would probably have been entitled to require an underlease.

Distinction between cases where conveyance is rectified on ground of mistake and where vendor has no remedy.

The difference between cases where the conveyance is rectified on the ground of mistake, and cases where the vendor has no remedy for his own mistake in the conveyance as to the quantity or quality of the estate is this, *viz.*, that in the former the parties never intended to deal with the property which is conveyed; while, in the latter (i), the vendors do intend to sell all their remaining interest in the property, but by their own mistake they misdescribe what that interest is (k): so, in the case put by Lord Cottenham, the vendor would really intend to sell the entire farm, and the only mistake would be as to the quantity. We may here remark, that at Law, evidence cannot be received to contradict the conveyance by showing that property, which would, *primâ facie*, pass under general words, was not intended to be included in the purchase (l).

(h) *Francis* v. *Minton*, L. R. 2 C. P. 543.

(i) *Okill* v. *Whittaker*, 2 Ph. 338.

(k) 2 Ph. 341; and see *Howkins* v. *Jackson*, 2 Mac. & G. 372.

(l) *Doe d. Norton* v. *Webster*, 4 Per. & Dav. 270.

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Vendor bound, *quà* the purchaser, may be not bound, *quà* third parties.

But, although a conveying party may be bound by his own mistake as between himself and the grantee, he may be not so bound thereby as between himself and other parties to the assurance (*m*). In one case, where the plan on the conveyance comprised more land than the vendor intended to convey, the Court in a suit by the vendor to rectify the deed, gave the purchaser the option of having the contract annulled, or of taking the conveyance in the form which the vendor intended; and this decision was rested on the ground that where the parties can be placed in the same position, as if no contract had been executed, the Court will interfere, provided the party aggrieved comes speedily for redress (*n*): but, after conveyance, the parties can seldom be restored to their original position; and it would seem the sounder doctrine that, in such a case, no relief should be granted, unless both parties have participated in the error. In the case just cited the purchaser appears to have been not altogether free from blame (*o*); and it cannot be regarded as an authority for the proposition that the Court will, to the prejudice of an innocent purchaser, rectify a conveyance merely on the ground of the vendor's mistake.

Or if vendor in fixing price rely on purchaser's information.

If, however, the vendor, in fixing the price, have altogether relied upon information furnished to him by the purchaser, and such information turn out to have been (even unintentionally) materially incorrect, this may entitle the vendor, even after conveyance, to relief in Equity (*p*).

Or if purchase were at undervalue from vendor ignorant of his rights, &c.

And relief has also been afforded, where a purchaser knowingly obtained, for an inadequate consideration, a conveyance from a vendor in humble circumstances and ignorant of his rights (*q*); and, in other cases, where advantage has been taken of the vendor's distress to procure an unfair

(*m*) See *Harryman* v. *Collins*, 18 Beav. 11.

(*n*) *Harris* v. *Pepperell*, L. R. 5 Eq. 1; the mistake was not discovered until three months after the execution of the conveyance; and see *Bloomer* v. *Spittle*, L. R. 13 Eq. 427, and *suprà*, p. 744.

(*o*) Each party had to pay his own costs.

(*p*) *Carpmael* v. *Powis*, 11 Jur. 158; 10 Beav. 36.

(*q*) *Evans* v. *Llewellyn*, 2 Bro. C. C. 150; see *Groves* v. *Perkins*, 6 Sim. 576; and *Sturge* v. *Sturge*, 12 Beav. 229.

bargain (r). And where a person who well knew the value of the property, obtained from a young man, a common sailor, lately come ashore, and much pressed for money, an estate for a grossly inadequate price, the Court, even as against the devisees of the purchaser, appointed a receiver before the hearing (s).

General rule as to distress.

It was laid down by Lord Langdale (t), that a man who is in distress may nevertheless contract; and if, being in distress, he procure other persons to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and, after that, acquiesces for a length of time in the performance without any notice of dissatisfaction or complaint, he is not entitled to set aside the transaction on the mere ground of his poverty or distress, in the absence of any deception or fraud proved to have been practised on him.

Inadequacy of consideration, no general reason for setting aside conveyance.

We shall hereafter see (u), that, upon the purchase of an estate in possession, and where no fiduciary relation exists between the parties (x), mere inadequacy of consideration, unless shown to be the result of fraud, surprise, misrepresentation (y), or improper concealment on the part of the purchaser, will be no defence even to a suit for specific performance, unless the inadequacy be so great as in itself to furnish evidence of fraud (z): and a case sufficient as a defence to a suit for specific performance may be insufficient to enable the vendor to rescind the contract after conveyance (a).

(r) See *Pickett* v. *Loggon*, 14 Ves. 215, 231; *Murray* v. *Palmer*, 2 Sch. & L. 474, 486; *Wood* v. *Abrey*, 3 Madd. 517; *Gordon* v. *Crawford*, cited Sug. 276. See *Curzon* v. *Belworthy*, 3 H. L. C. 742.

(s) *Stillwell* v. *Wilkins*, Jac. 280; see *Farmer* v. *Farmer*, 1 H. L. C. 724, where the vendor was deaf and dumb, but under the circumstances relief was refused.

(t) *Knight* v. *Marjoribanks*, 11 Beav., see p. 349.

(u) *Infrà*, Ch. XVIII.

(x) *Harrison* v. *Guest*, 8 H. L. Ca. 481; *Denton* v. *Donner*, 23 Beav. 285.

(y) See *Pickett* v. *Loggon*, 14 Ves. 215; *Reynell* v. *Sprye*, 8 Ha. 222; 1 De G. M. & G. 660; and see *Haygarth* v. *Wearing*, L. R. 12 Eq. 320, where, although the fiduciary relation was not established, the conveyance was set aside for misrepresentation.

(z) See *Rice* v. *Gordon*, 11 Beav. 265; *Drought* v. *Eustace*, 1 Moll. 328, 338; *Tyler* v. *Yates*, L. R. 6 Ch. Ap. 665.

(a) See Sug. 244; *Vigers* v. *Pike*,

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Mutal ignorance.

And it has been held that, where both parties at the time of the contract, are equally in the dark as to the value of the property, (as where the sale was of an allotment under an Inclosure Act, which had not yet been set out,) mere inadequacy of consideration is no defence to a suit for specific performance (*b*): but the inadequacy might, it is conceived, be so gross as to take a case out of the general rule.

Uncertainty of amount of consideration.

A distinction has been made between cases where the consideration is for a stated sum, and where it is for an uncertain amount, as, *e. g.*, a life annuity. In the latter class of cases, it has been thought that while the contract is executory, the Court will entertain the question of the adequacy of the consideration: but it seems doubtful whether this distinction is sustainable. In all the cases where a contract for sale in consideration of an annuity, or other uncertain payment, has been set aside, there appears to have been some other ground for relief besides mere inadequacy of consideration; as, *e. g.*, fraud or undue influence (*c*).

Want of professional advice.

The non-employment of a solicitor on the vendor's behalf will not make a sale for undervalue impeachable, if the vendor were fully aware of the nature of the transaction (*d*). Thus, where the consideration was a provision of board and lodging for the vendor, a bed-ridden old man, during the rest of his life, and he refused all professional advice, and deliberately pressed the sale upon the purchaser, the transaction was upheld, notwithstanding the inadequacy of the consideration (*e*): but a purchase from a poor sick man,

8 Cl. & F. 645; *Playford* v. *Playford*, 4 Ha. 546; *Bellamy* v. *Sabine*, 2 Ph. 425; *Wilde* v. *Gibson*, 1 H. L. Ca. 617; *Falcke* v. *Gray*, 4 Dr. 661. Lord Eldon seems to have entertained a different opinion, see *Coles* v. *Trecothick*, 9 Ves. 234. As to a misstatement of the consideration in the conveyance, see *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Bowen* v. *Kirwan*, Ll. & G., t. Sug. 47, 65; *Ahearne* v. *Hogan*, 1 Dru. 310, 320, 326.

(*b*) *Anon.* 1 Bro. C. C. 158, cited 6 Ves. 24; see also *Baxendale* v. *Seale*, 19 Beav. 601.

(*c*) See *Davies* v. *Cooper*, 5 My. & Cr. 270; *Valentine* v. *Dickinson*, 7 Jur. N. S. 857; and *vide infrà*, Ch. XVIII.

(*d*) *Harrison* v. *Guest*, 8 H. L. Ca. 481; 6 De G. M. & G. 424.

(*e*) *Harrison* v. *Guest*, *ubi suprà*.

shortly before his death, partly in consideration of a weekly payment, under circumstances of great precipitation, and without proper protection, was set aside (*f*). So, also, a purchase by a solicitor of an equity of redemption from a day labourer without legal advice, where the fairness of the transaction was not proved by the purchaser (*g*). So, also, a purchase from a poor aged woman, without professional assistance, who believed that she could not, though the purchaser knew that she could, make a good title (*h*). So, also, where the consideration was an inadequate weekly payment, and the vendor, an old and infirm woman, was ignorant of the value of the property, and had no professional advice (*i*). So, also, where the vendor had no knowledge of the property or its value, nor any legal advice, but relying on the representations of A., the agent of a former owner, conveyed the property to A.'s daughter for an inadequate price (*k*).

Distinction in cases of reversionary interests.

But until the Statute 31 Vict. c. 4, which we shall presently notice, there was a well-recognised distinction between sales of estates in possession and estates in reversion: and on sales of the latter description, if effected by private contract, mere inadequacy of consideration would enable the Court to decree a re-conveyance: and the *onus probandi* did not, as in ordinary cases, rest with the plaintiff seeking to impeach the sale, but with the defendant who upheld it (*l*); except where the vendor himself fixed the price (*m*).

***Onus probandi* was, till lately, on purchaser.**

Except where vendor fixed the price.

The rule applied where the transac-

And the rule was held to apply equally where the transaction was a mortgage or charge, and not an absolute sale (*n*);

(*f*) *Clark* v. *Malpas*, 31 Beav. 80; affd. on appeal.

(*g*) *Prees* v. *Coke*, L. R. 6 Ch. Ap. 645.

(*h*) *Summers* v. *Griffiths*, 35 Beav. 27.

(*i*) *Baker* v. *Monk*, 33 Beav. 419; affd. on appeal, 10 Jur. N. S. 691.

(*k*) *Haygarth* v. *Wearing*, L. R. 12, Eq. 320.

(*l*) See *Coles* v. *Trecothick*, 9 Ves. 246; *Gowland* v. *De Faria*, 17 Ves., see p. 24; *Hinckman* v. *Smith*, 3 Russ. 433; *Kendall* v. *Beckett*, 2 Russ. & M., see p. 90; *Addis* v. *Campbell*, 1 Beav., see p. 262.

(*m*) *Perfect* v. *Lane*, 3 De G. F. & Jo. 369.

(*n*) *Bromley* v. *Smith*, 26 Beav. 644; *Tottenham* v. *Green*, 32 L. J. Ch. 201.

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tion was a mortgage.

and it was not material, that the reversioner was of mature age, and fully cognizant of the nature and effect of the transaction (o); nor was it necessary for him to show that at the time he was in pecuniary distress (p); and, notwithstanding the most perfect *bona fides*, the transaction might be set aside, unless full value was given (q).

What interests are reversionary within the rule.

The relief was afforded where a small part of the property was in possession and the bulk was reversionary (r): in one case, where the value of the property in possession was 1331*l*, and of that in reversion only 312*l*., the purchase was nevertheless set aside for undervalue (s); but the rule did not apply where the tenant for life concurred with the immediate reversioner, so that the sale was, in effect, of an estate in possession (t); nor where the sale was made by a vendor entitled to what was substantially, an estate in possession, and to the ultimate reversion, subject only to an intervening life estate (u); nor where the contract was entered into between a tenant and the person entitled to the reversion and to the rents during the term (x); nor where the transaction was in the nature of a family arrangement (y); nor where the sale was of a life estate in possession, subject to rent-charges which absorbed nearly the whole of the income (z).

Where their value depends on incalculable contingencies.

The relief was more sparingly afforded where the reversion was subject to an almost incalculable contingency; as where it was expectant on the death, without issue, of a tenant for life aged sixty-three and unmarried (a): but the fact that the

(o) *Ib. Emmet* v. *Tottenham*, 10 Jur. N. S. 1090.

(p) *Bromley* v. *Smith*, *ubi suprà*.

(q) *St. Albyn* v. *Harding*, 27 Beav. 11; *Foster* v. *Roberts*, 29 Beav. 467; see also *Salter* v. *Bradshaw*, 26 Beav. 161.

(r) *Lord Portmore* v. *Taylor*, 4 Sim. 182.

(s) *Nesbitt* v. *Berridge*, 32 Beav. 282; 9 Jur. N. S. 1044; affd. 10 Jur. N. S. 53.

(t) *Wood* v. *Abrey*, 3 Madd. 417; see *Cooke* v. *Burtchaell*, 2 Dru. & W. 165; and *Sibbering* v. *Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(u) *Wardle* v. *Carter*, 7 Sim. 490.

(x) *Scott* v. *Dunbar*, 1 Moll. 459.

(y) *Talbot* v. *Staniforth*, 1 J. & H. 484.

(z) *Webster* v. *Cook*, L. R. 2 Ch. Ap. 542.

(a) *Baker* v. *Bent*, 1 Russ. & M. 224; and see *Whichcote* v. *Bramston*, cited 4 Sim. 202; and *Sherwood* v. *Robins*, 1 Moo. & M. 194.

reversion was dependent upon contingencies, which could not be estimated by actuaries, did not relieve the purchaser from the burden of showing that full value was given (*b*).

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Relief given to vendors of reversions as well as to expectant heirs.

And the relief was afforded, as well to the mere owners of reversionary interests (*c*), as to heirs or devisees in remainder (*d*) dealing with their expectancies; although an extraordinary protection was afforded to the latter classes of vendors (*e*). A distinction would, however, probably have been drawn between the owner of a reversion claiming by descent, devise, or settlement, and one who had himself acquired it by ordinary sale and purchase.

Relief afforded against sub-purchaser with notice, notwithstanding voluntary confirmation by reversioner.

And where a person bought a reversion, at a gross undervalue, from an heir in distressed circumstances, and re-sold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner, being still in distress, was induced, by the original purchaser, to join in and confirm the re-sale, and to concur in suffering recoveries which were necessary to perfect the title, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the sub-purchaser, on re-payment of the price paid on the first purchase (*f*): but the case would have been different if the sub-purchaser had had no notice of the original fraud, even although he might not have acquired the legal estate (*g*).

(*b*) *Talbot* v. *Staniforth*, 1 Jo. & H. 484; *Visct. Valentia* v. *Denton* (1867, V. No. 34), M. R. 20 July, 1872, where the purchaser's actuary admitted that the contingency was incalculable, and the sale was set aside; and see *Barnardiston* v. *Lingood*, 2 Atk. 133, 135; *Addis* v. *Campbell*, 4 Beav. 401; *Davies* v. *Cooper*, 5 Myl. & C. 270; *Boothby* v. *Boothby*, 1 Mac. & G. 604; *Woodroffe* v. *Allen*, 1 H. & J. 73; Sug. 277. Father and son, when dealing with a third person, need not be represented by separate solicitors, S.C. *Cooke* v. *Burtchaell*, 2 Dru. & W. 165.

(*c*) *Kendall* v. *Beckett*, 2 R. & M. 88; *Bawtree* v. *Watson*, 3 Myl. & K. 339; *Davies* v. *Cooper*, 5 Myl. & C. 270; *Edwards* v. *Browne*, 2 Coll. 100; see *Sewell* v. *Walker*, 12 Jur. 1041.

(*d*) See *Edwards* v. *Burt*, 2 De G. M. & G. 57.

(*e*) *Wiseman* v. *Beake*, 2 Vern. 121; *Cole* v. *Gibbons*, 3 P. Wms. see 293; Sug. 276; *King* v. *Savery*, 1 Sm. & G. 271.

(*f*) *Addis* v. *Campbell*, 4 Beav. 401; and see *King* v. *Savery*, 1 Sm. & G. 271; 5 H. L. Ca. 627; *Wright* v. *Vanderplank*, 2 Jur. N. S. 599.

(*g*) See *Nagle* v. *Baylor*, 3 Dru. &

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What circumstances will deprive heir of special protection—rules laid down in *King* v. *Hamlet*.

It was laid down by the Court, in deciding a modern case (*h*), First, that this extraordinary protection must be withdrawn from the heir, "if it shall appear that the transaction was known to the father or other person standing *in loco parentis*,—the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession,—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the old bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing."

Lord St. Leonards' and V.-C. Wood's comments thereon.

The first of these propositions has been criticized by Lord St. Leonards, on the ground that the equity is that of the son, not of the parent: and in a modern case V.-C. Wood considered its meaning to be, that where the heir deals not behind the back of his father, but with his sanction and assistance, he has all the protection which his father can give him, and is not entitled to the same relief as if the contract had been entered into without such parental protection (*i*). As to the second of the above propositions, Lord St. Leonards has observed, that without the concluding qualification it could not safely be acted upon (*k*).

Family arrangements not within the

Family arrangements are exempt from the strict rules applicable to cases between ordinary vendors and pur-

W. 60; see too *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735; and at Law, *Stevenson* v. *Newnham*, 17 Jur. 600; but see *contrà*, where the property is an equitable *chose in action*, *Cockell* v. *Taylor*, 15 Beav. 103. See, however, *Barnard* v. *Hunter*, 2 Jur. N. S. 1213, where this decision was disapproved by Lord Cranworth.

(*h*) *King* v. *Hamlet*, 2 Myl. & K. see p. 473.

(*i*) *Talbot* v. *Staniforth*, 1 Jo. & H. 484, 502.

(*k*) See comments on *King* v. *Hamlet*, Sug. 11th ed. App.

exceptional rule.

chasers (*l*); and a transaction of this nature between father (tenant for life) and son (tenant in tail) does not fall within the exceptional rule which we are now considering (*m*). But such arrangements are justly regarded with jealousy by the Court (*n*); especially when entered into shortly after the child attains majority, or when the parent derives considerable benefit (*o*). At the same time, if there is no misrepresentation or suppression (*p*), and the transaction is in the nature of a re-settlement for the common good of the family (*q*), it will be supported, notwithstanding the exercise of parental influence (*r*), or the non-employment of an independent professional adviser (*s*). Nor is it necessary in order to support such an arrangement, that it should be a compromise of doubtful or disputed rights; the preservation of the estate may be a sufficient motive: and, in such cases, the Court does not minutely weigh the *quantum* of the consideration (*t*). But the transaction must be strictly a family arrangement: thus, where a tenant for life purchased from his nephew the reversion in the family estate, without any

(*l*) *Tweddell* v. *Tweddell*, Turn. & R. 1, 13: see *Devey* v. *Devey*, 9 Ha. 230; *Houghton* v. *Lees*, 1 Jur. N. S. 862; see cases of such arrangements being set aside, *Sturge* v. *Sturge*, 12 Beav. 229; *Hoghton* v. *Hoghton*, 15 Beav. 278; *Lawton* v. *Campion*, 18 Beav. 87; *Bury* v. *Oppenheim*, 26 Beav. 594.

(*m*) See *Bellamy* v. *Sabine*, 2 Ph. 425; *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436; *Cooke* v. *Burtchaell*, 2 Dru. & W. 165. See also, as to family arrangements generally, *Stapilton* v. *Stapilton*, 1 Atk. 2; 2 Wh. & T. L. C. 824; *Neale* v. *Neale*, 1 Keen, 672, 684; *Farmer* v. *Farmer*, 1 H. L. C. 724; and *Persse* v. *Persse*, 7 Cl. & F. 279; *Wallace* v. *Wallace*, 2 Dr. & War. 452, 470; *Westby* v. *Westby*, 2 Dru. & W. 502; *Smith* v. *Pincombe*, 3 Mac. & G. 653; *Baker* v. *Bradley*, 2 Sm. & G. 531; reversed 25 L. J. Ch. 7; 7 De G. M. & G. 597; *Head* v. *Godlee*, Johns. 536; *Dimsdale* v. *Dimsdale*, 3 Drew. 556; *Berdoe* v. *Dawson*, 11 Jur. N. S. 254.

(*n*) *Tweddell* v. *Tweddell*, and *Hoghton* v. *Hoghton*, *ubi suprà*; and see *Wright* v. *Vanderplank*, 2 K. & Jo. 1; 8 De G. M. & G. 133; *Turner* v. *Collins*, L. R. 7 Ch. Ap. 329.

(*o*) *Wright* v. *Vanderplank*, *Turner* v. *Collins*, *ubi suprà*; *Kempson* v. *Ashbee*, L. R. 10 Ch. Ap. 15.

(*p*) *Greenwood* v. *Greenwood*, 2 De G. Jo. & S. 28; *Brooke* v. *Lord Mostyn*, *ib.* 373.

(*q*) *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Talbot* v. *Staniforth*, 1 K. & Jo. 484.

(*r*) *Hartopp* v. *Hartopp*, 2 Jur. N. S. 794; 21 Beav. 259; see too *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*s*) *Jenner* v. *Jenner*, 2 De G. F. & Jo. 359.

(*t*) *Williams* v. *Williams*, 2 Dr. & Sm. 378; affirmed L. R. 2 Ch. Ap. 294.

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provision for its re-settlement, the case was held to fall within the general rule as to reversionary interests (*u*). There ought, however, to be no unnecessary delay in seeking to set aside such a transaction (*x*).

Adequacy of consideration, how determined.

The question of adequacy of consideration must be determined with reference to circumstances as existing at the date of the contract, and not to subsequent events (*y*). It was formerly held (*z*) sufficient to avoid the sale of a reversionary interest, that the price paid was not the estimated value according to the tables used by actuaries; but subsequent decisions and authorities established the more reasonable doctrine, that the market value, (which is generally about two-thirds of the estimated value (*a*),) was alone to be regarded (*b*): and, on a *bonâ fide* sale by auction, under circumstances calculated to insure a fair sale, its result was considered in itself to fix the market value (*c*): so, on a sale by private contract, the circumstance of the bargain having been declined by various parties (*d*), or of the property having been valued by competent parties (*e*), was material. In one case, where the market value appeared to have been rather better than 1900*l*., and the price paid was 1700*l*., the

(*u*) *Talbot* v. *Staniforth*, 1 Jo. & H. 484; in this case there was a subsequent re-settlement by will, but it formed no part of the consideration.

(*x*) See *Turner* v. *Collins*, L. R. 7 Ch. Ap. 329; and compare *Kempson* v. *Ashbee*, L. R. 10 Ch. Ap. 15, where under the circumstances a considerable time was allowed.

(*y*) *Gouland* v. *De Faria*, 17 Ves. 20; *Boothby* v. *Boothby*, 2 H. & Tw. 214; natural love and affection may, it appears, if stated in the deed, (see *Willan* v. *Willan*, 2 Dow. 274,) aid an inadequate pecuniary consideration, *Whalley* v. *Whalley*, 3 Bli. 1.

(*z*) *Gowland* v. *De Faria*, *suprà*; and see *Peacock* v. *Evans*, 16 Ves. 512.

(*a*) See *Potts* v. *Curtis*, You. 543; Sug. 279; as to the value of surveyor's evidence, *vide ib.* 491; and see *Edwards* v. *Burt*, 2 De G. M. & G. 55; and as to small reliance being placed upon it, see *Waters* v. *Thorn*, 22 Beav. 547; *Foster* v. *Roberts*, 29 Beav. 470, 471.

(*b*) *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436; *Hinckman* v. *Smith*, 3 Russ. see p. 435; *Headen* v. *Rosher*, 1 M'C. & Y. 89; *Potts* v. *Curtis*, You. 543; *Newton* v. *Hunt*, 5 Sim. 521; *Wardle* v. *Carter*, 7 Sim. 490; see *Sewell* v. *Walker*, 12 Jur. 1041.

(*c*) *Shelly* v. *Nash*, 3 Madd. 232; *Fox* v. *Wright*, 6 Madd. 111; *Lord Aldborough* v. *Trye*, 7 Cl. & F. 436.

(*d*) *Moth* v. *Atwood*, 5 Ves. 845; *Perfect* v. *Lane*, 3 De G. F. & Jo. 369.

(*e*) *Edwards* v. *Burt*, 2 De G. M. & G. 63.

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Court held, that the inadequacy was sufficient to entitle the vendor to relief (*f*); so, where the value was assumed to be 580*l.*, and the price was 500*l.* and 50*l*, payable on a future contingency (*g*); so, where the value was 238*l.*, and the price 200*l.* (*h*); so, where the value was 400*l.* and the price 370*l.* (*i*); and the tendency of the latest decisions was to establish that unless a person gave much more than the value, it was impossible to purchase a reversionary interest with safety, except under a sale by auction (*k*). Where, however, bank stock was valued by actuaries at 200*l.* per cent. when its then market value was in fact 215*l.* per cent., this was not considered sufficient proof of a purchase at undervalue (*l*).

General remarks on the cases.

The cases which we have just cited abundantly prove the wisdom of the ordinary rule which refuses to set aside a conveyance on the mere ground of inadequacy of consideration. If undervalue, not so gross as to be indicative of fraud, and unaccompanied by pressure, is of itself to be a sufficient ground for granting such relief, the question whether the undervalue is gross, or only trivial, cannot arise; and the Court must set aside the deed in every case where the actual consideration falls short of the full value. The paternal care thus exhibited towards heirs and reversioners, not always the most deserving objects, overstepped the bounds of a legitimate protection; and rendered their expectant interests practically unsaleable, except in the comparatively rare instances where they were willing to encounter the publicity, delay, and additional expense of a sale by auction. It was therefore no matter of surprise that the Legislature interposed, and, by a late Statute (*m*),

(*f*) *Edwards* v. *Browne*, 2 Coll. 100. Of course, the circumstance of a lot sold by auction being conveyed in the same deed with property purchased for an inadequate consideration by private contract, was no bar to the relief as respects the latter. *Newton* v. *Hunt*, 5 Sim. 511.

(*g*) And see *Edwards* v. *Burt*, 2 De G. M. & G. 62.

(*h*) *Jones* v. *Ricketts*, 31 Beav. 130; 8 Jur. N. S. 1198.

(*i*) *Foster* v. *Roberts*, 29 Beav. 467.

(*k*) See dictum of the M. R. in *Foster* v. *Roberts*, 29 Beav. 471.

(*l*) *Perfect* v. *Lane*, 3 De G. F. & Jo. 369; 30 Beav. 197.

(*m*) 31 Vict. c. 4; see the extended meaning of the word "purchase."

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provided that no purchase, made *bonâ fide*, and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall in future be opened or set aside merely on the ground of undervalue: but this enactment does not apply to any purchase concerning which a suit was pending on the 1st January, 1868. The rule as to non-interference after conveyance, on the mere ground of undervalue, is now the same whether the estate sold be in possession or a reversion; and, as in the former case, the inadequacy may be so great as of itself to furnish evidence of fraud, so, notwithstanding the late Act, the same rule also applies with equal, if not greater force, to the purchase of a reversionary interest (*n*).

Security for price of goods bought to re-sell and so raise money, supported.

It was held in a modern case, that where goods were sold to a person in distressed circumstances by a tradesman, who knew that they were bought merely with a view to raise money by selling them again, and they were charged at fair and reasonable prices, and the purchaser, by way of security for the price, mortgaged his reversionary interests as expectant heir, the Court would not set aside the securities (*o*). In an earlier case, a bond, given for silks taken up to sell to raise money, was allowed to stand as a security only for the sum really raised (*p*): but the decision turned upon the transaction being a loan at usurious interest; the transfer of goods being a shift or cloak for usury (*q*).

Sale fraudulent as against tenant in tail, when set aside at suit of remainderman.

It would seem that where fraud has been practised on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainderman may file a bill to set it aside; but not if there were an independent intention to

(*n*) *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 6 Ch. Ap. 665; both cases since the Act, where mortgages given under extreme pressure and at an exorbitant rate of interest were ordered to stand as securities for the moneys actually advanced, with interest at 5 per cent.

(*o*) *King* v. *Hamlet*, 2 Myl. & K. 456; 9 Bli. 610; see Sir E. Sugden's remarks, Sugden's Law of Property, 65, *et seq.*

(*p*) *Barker* v. *Vansommer*, 1 Bro. C. C. 149.

(*q*) Per Lord Brougham, C., 2 Myl. & K. 486.

bar the entail, and the fraud applied only to some part of the transaction distinct from that object (r).

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Terms on which vendor was entitled to relief.

When relief is given, the conveyance will, unless the transaction were merely colourable (s), stand as a security for the principal sum and simple (but not compound (t)) interest (u); and for moneys expended by the purchaser in lasting and valuable improvements, and interest (x); and it would seem, that where interest has been charged to the expectant heir at an exorbitant rate, it will be reduced, notwithstanding the repeal of the usury laws (y).

Purchaser's rights on keeping up policies.

In one case where, on the sale of a reversionary interest, the purchaser took an assignment of life policies, which were then valueless, and kept them up at his own expense, he was held entitled to the moneys received in respect of the policies before the transaction was impeached (z); but in another case, a mortgagee was disallowed what he had paid for premiums on life policies included in his security, notwithstanding that the deed provided in the usual way for keeping the policies on foot (a): the contract as to paying the premiums was treated as altogether void; and both cases were rested on the principle that there was no obligation on the purchaser or mortgagee to keep up the policies; if he did so, and the result was favourable to himself, he might retain the benefit; if it turned out otherwise, he had no charge on

(r) See *Bellamy* v. *Sabine*, 2 Ph. 425; *Tarleton* v. *Liddell*, 17 Q. B. 390.

(s) *Wilkinson* v. *Fowkes*, 9 Ha. 592.

(t) *Gowland* v. *De Faria*, 17 Ves. 20; *Bellamy* v. *Sabine*, 2 Ph. 442.

(u) *Gowland* v. *De Faria*, *ubi suprà*; see the decree in *King* v. *Savery*, 1 Sm. & G. 316; 2 Jur. N. S. 503; 8 De G. M. & G. 311; 5 H. L. Ca. 627. And see *Miller* v. *Cook* and *Tyler* v. *Yates*, cited in note (y).

(x) *Murray* v. *Palmer*, 2 Sch. & L. 490; *Salter* v. *Bradshaw*, 26 Beav. 161. See, as to allowance for improvements of charity property, *Att.-Gen.* v. *Kerr*, 2 Beav. 420.

(y) *Croft* v. *Graham*, 2 De G. Jo. & S. 155; and see *Miller* v. *Cook*, L. R. 10 Eq. 641, and *Tyler* v. *Yates*, L. R. 6 Ch. Ap. 665, affirming V.-C. S. L. R. 13 Eq. 265, both cases since the late Act.

(z) *Foster* v. *Roberts*, 29 Beav. 467; and see *Bell* v. *Ahearne*, 12 Ir. Eq. Rep. 576.

(a) *Pennell* v. *Millar*, 23 Beav. 172; see and consider this case.

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the estate for payments voluntarily made (*b*). Where the policies are effected by the purchaser simply for his own security, and the vendor derives no benefit therefrom, the principle above stated seems to apply: but where, on the transaction being set aside, the vendor takes a re-assignment of the policies, and keeps them on foot for his own benefit, he clearly ought to re-pay what has been expended by the purchaser for premiums (*c*).

Terms on which sale is set aside.

Where the transaction is set aside the purchaser will be charged with what he has actually received, and interest: and, in one case, where he had received from the vendor interest on the purchase-money, such payments were held to have been in reduction of the principal, and he himself was charged with interest upon them (*d*): but he will not, like a mortgagee, be charged with what without wilful default he might have received (*e*). Where inadequacy of price is the *sole* ground for the interference of the Court, the defendant has been allowed his costs (*f*), except those of the reference as to value (*g*); but slight additional circumstances have induced the Court to refuse them (*h*). The tendency however of the late decisions has been to deal with the costs of such a suit not as in a suit for redemption, but to throw the whole costs on the defendant, even where inadequacy of value has been the sole title to relief (*i*). If a bill filed by

Costs.

(*b*) See and consider *Nesbitt* v. *Berridge*, on appeal, 10 Jur. N. S. 53; reversing the M. R., 9 Jur. N. S. 1044.

(*c*) See further as to whether the lender or the borrower is entitled on repayment of the loan to a policy effected by the former on the life of the latter, *Bruce* v. *Garden*, L. R. 5 Ch. Ap. 32; *Foster* v. *Roberts* and *Bell* v. *Ahearne*, *ubi suprà*; and *Morland* v. *Isaac*, 20 Beav. 389; *Courtenay* v. *Wright*, 2 Giff. 337; *Freme* v. *Blade*, 2 De G. & Jo. 582; see also *Knox* v. *Turner*, L. R. 9 Eq. 155.

(*d*) *Murray* v. *Palmer*, 2 Sch. & L. 488.

(*e*) See Sug. 254; Seton, 630; and the judgment in *Murray* v. *Palmer*, 2 Sch. & L. 489, against such liability but see *contrà* the decree, *ib.*, 490.

(*f*) *Dawtree* v. *Watson*, 3 Myl. & K., see p. 341; see Sug. 326.

(*g*) *Boothby* v. *Boothby*, 15 Beav. 212.

(*h*) *Wood* v. *Abrey*, 3 Madd., 417, see p. 424; *Newton* v. *Hunt*, 5 Sim. 523.

(*i*) See *Edwards* v. *Burt*, 2 De G. M. & G. 55; *Foster* v. *Roberts*, *ubi suprà*; *Talbot* v. *Staniforth*, 1 J. & H. 484; but see *Miller* v. *Cook*, L. R. 10 Eq. 641, where the defendant was allowed to add his costs to his security.

the heir of a deceased vendor allege that the purchase-money is in part unpaid, the personal representative must be made a party, as being interested in maintaining the validity of the contract (*k*).

Right to reconveyance lost by acquiescence or confirmation.

And, of course, long delay (*l*) and clear (*m*) acquiescence on the part of the vendor,—(and this notwithstanding his poverty,)—or his advised confirmation of the sale (*n*),—which confirmation may be as well by will as by deed (*o*)—will bar the right to relief (*p*); nor will relief be given to the prejudice of a *bonâ fide* sub-purchaser without notice (*q*). It has been held, that in the case of the sale of a reversion for undervalue, time does not begin to run against the vendor until the reversion falls into possession (*r*). We may here remark, that the statement of consideration in the conveyance is not conclusive; but any additional consideration, not inconsistent with the terms of the deed, may be established by parol evidence (*s*).

Conveyance, when reformed in Equity.

And, as a general rule, where it is clearly shown that through mutual mistake, or by reason of fraud, the conveyance fails to express the intention of the parties, and what that intention really was (*t*), a Court of Equity will rectify

(*k*) *Wilkinson* v. *Fowkes*, 9 Ha. 193.

(*l*) *Moth* v. *Atwood*, 5 Ves. 845; *Wright* v. *Vanderplank*, 2 K. & Jo. 1; 8 De G. M. & G. 133; *Willoughby* v. *Brideoake*, 11 Jur. N. S. 708; *Lord Clanricarde* v. *Henning*, 7 Jur. N. S. 1113.

(*m*) See *Gerrard* v. *O'Reilly*, 3 Dru. & W. 414; see too *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735.

(*n*) *Lyddon* v. *Moss*, 4 De G. & Jo. 104; but there is no confirmation unless the vendor is fully aware of the voidability of the transaction.

(*o*) *Stump* v. *Gaby*, 2 De G. M. & G. 623.

(*p*) *Cole* v. *Gibbons*, 3 P. Wms. 290, 294; *vide suprà*, pp. 48, 49; *infrà*, sect. 6; and see *Knight* v. *Marjoribanks*, 11 Beav. 322; *Farmer* v. *Farmer*, H. L. C. 724; *Sibbering* v. *Earl of Balcarres*, 3 De G. & S. 735.

(*q*) *Thomas* v. *Davis*, 1 Dick. 301; *Cobbett* v. *Brock*, 20 Beav. 524; and see, at Law, *Parker* v. *Patrick*, 5 T. R. 175; *Load* v. *Green*, 15 M. & W. 219; *White* v. *Garden*, 10 C. B. 919; *Stevenson* v. *Newnham*, 17 Jur. 600, Exch. C.

(*r*) *Salter* v. *Bradshaw*, 26 Beav. 161; where the transaction was set aside after the lapse of forty years.

(*s*) *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; affd. 9 Jur. 633; *Nixon* v. *Hamilton*, 2 Dru. & Wal. 364, 387; *Keenan* v. *Handley*, 2 De G. Jo. & S. 283.

(*t*) *Brougham* v. *Squire*, 1 Dre. 151.

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it (*u*): but will not supply terms which have been intentionally omitted under the mistaken notion of their illegality (*x*).

Court preserves property pending litigation.

The Court will, if necessary, in a suit to set aside a conveyance, make an order to preserve the property pending litigation: *e. g.*, in case of an advowson, by restraining the defendant from presenting to a vacancy; and this, even although he be a sub-purchaser for value, and deny notice of the original fraud (*y*).

Illegal motive of purchaser does not avoid conveyance.

We may remark, that if a grantee fraudulently conceal and subsequently act on an intention of using the premises for an immoral and illegal purpose, this will not prevent the estate from passing to him at Law under the executed assurance (*z*).

As to power of Divorce Court to alter marriage settlements.

Lastly, we may remark, as connected with the present subject, that under the 22 & 23 Vict. c. 61, s. 5, the Court of Divorce may, after a final decree of nullity of marriage or dissolution of marriage, inquire into the existence of antenuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree; and may make such orders with reference to the application of the whole, or a portion of the property settled, either for the benefit of the children of the marriage, or of their respective *parents*, as to the Court shall seem fit. It has been held, that the Court has no jurisdiction, under this section, to make an order as to the application of the property unless there is issue of the marriage living at the time when the order is applied for (*a*).

(*u*) *Marquis of Breadalbane* v. *Marquis of Chandos*, 2 Myl. & C. 711; *infrà*, sect. 8. Where marriage settlement rectified, see *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Rogers* v. *Earl*, 1 Dick. 294; Sug. 172. Where rectification refused, see *Elwes* v. *Elwes*, 7 Jur. N. S. 747.

(*x*) *Infrà*, Ch. XVIII. s. 8.

(*y*) *Greenslade* v. *Dare*, 17 Beav. 502.

(*z*) *Feret* v. *Hill*, 15 C. B. 207.

(*a*) *Thomas* v. *Thomas*, 2 Sw. & Tr. 89; *Bird* v. *Bird*, L. R. 1 P. & D. 231; *Corrance* v. *Corrance*, *ib.*, 495; *Graham* v. *Graham and Griffith*, *ib.*, 711.

(3.) *Vendor's rights of pre-emption under the Lands Clauses Consolidation Act*, 1845.

Rights of pre-emption, &c., of vendors under Lands Clauses Consolidation Act, 1845, in respect of superfluous lands.

By the Lands Clauses Consolidation Act, 1845, the promoters of the undertaking authorized by the special Act, are required, within the periods thereby prescribed, or, if no period be prescribed, within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking. Such superfluous lands unless they be situate in a town, or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed: or if he refuse, or for six weeks neglect, to signify his wish to purchase the same, or cannot be found, then to other immediately adjoining owners: and unless a sale be made either to such person, or adjoining owners, or some other person, the superfluous lands remaining unsold at the expiration of such period are to vest in, and become the property of, the owners of the land adjoining thereto; in proportion to the extent of their lands respectively adjoining the same (*b*).

Cases where the right of re-purchase arises.

These sections have been held to apply to lands of which the company has only acquired the reversion, subject to a term (*c*). The right of re-purchase is not merely personal to the original proprietors, but devolves upon future owners of the estate from which the superfluous lands were severed (*d*); and may be exercised, within the prescribed period of ten years, if the company attempt to sell the lands to some other person (*e*). It would seem probable that, where the

(*b*) See sects. 127, 128, and 129. The Metrop. Dist. R. Co. are by their special Acts exempted from the obligations of these sections, and have an unrestricted power of sale; see *Tomlin* v. *Budd*, L. R. 18 Eq. 368.

(*c*) *Moody* v. *Corbett*, L. R. 1 Q. B. 510.

(*d*) *Lord Carington* v. *Wycombe R. Co.*, L. R. 2 Eq. 825; affd. L. R. 3 Ch. Ap. 377; but see *Highgate Archway Co.* v. *Jeakes*, L. R. 12 Eq. 9, where the former case was not cited.

(*e*) *Ibid.*

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land is taken by the company for other than the authorized purposes, the landowner may, on re-payment of a proportionate price for the land, claim a re-conveyance (*f*).

Cases where it does not arise.

The right of re-purchase does not, however, arise, where the company, having abandoned its original undertaking, uses the land for some new purpose, for which they have obtained the sanction of the legislature (*g*); nor where the enterprise is entirely abandoned (*h*); in which case, under the 218th section of 6 Will. IV. c. 75, the abandoned railway, at the end of three years from the date of the abandonment, passes to the owners for the time being of the adjoining land on either side. In one case, where the company used a narrow strip, part of land purchased from A., for the purpose of providing B. with a means of access to his severed lands, it was held that this was an accommodation work within the meaning of the Act, and that A. had no right of re-purchase as regards the narrow strip (*i*).

Where, after service of notice to treat, the company acquires the land for their ordinary purposes by agreement, the landowner does not lose his statutory right of re-purchase, if the land become superfluous (*k*); but the right does not arise where the company has acquired the land by agreement, for extraordinary purposes (*l*). Land which has been acquired and used for the purposes of the company, will, on ceasing to be so used, become superfluous within the meaning of the Act; and if not sold within the prescribed period, will vest in the adjoining landowners (*m*). If a sale

(*f*) *Per* Lord Cairns, L. R. 3 Ch. Ap. 381.

(*g*) *Astley* v. *Manchester, Sheffield, and L. R. Co.*, 2 De G. & Jo. 453.

(*h*) *Smith* v. *Smith*, L. R. 2 Exch. 282; and see as to abandoned lines, 13 & 14 Vict. c. 83, s. 27; and the Abandonment of Railways Act, 1869 (32 & 33 Vict, c. 114), which provides for the winding-up of a railway company.

(*i*) *Lord Beauchamp* v. *G. W. R. Co.*, L. R. 3 Ch. Ap. 745.

(*k*) *Lord Carington* v. *Wycombe R. Co.*, L. R. 3 Ch. Ap. 377.

(*l*) *City of Glasgow Union R. Co.* v. *Caledonian R. Co.*, L. R. 2 Sc. Ap. 160.

(*m*) *May* v. *G. W. R. Co.*, L. R. 7 Q. B. 364.

is attempted by the company within the prescribed period, the statutory right of re-purchase at once arises (*n*).

Meaning of the word "town" in these sections;

The word "town" has been held to mean, the space on which the dwelling-houses are collected so near each other that they may be said to be continuous; so also, an open space, occupied as a mere accessory to the convenience of a dwelling-house, would seem to come within the term (*o*); but lands situate within the limits of a borough, but beyond the mass of houses forming the town, have been held not to be within the section (*p*).

of lands "used for building purposes;"

Lands actually laid out for building purposes, or, it would seem, let on building leases, are lands "used for building purposes" within this section; but land which is merely fit to be used for such purposes, even though it may be unsuited to any other purpose, is not within the term (*q*).

of "adjoining owners."

A lessee whose land was separated from the superfluous land by a private road, of which during his tenancy he had the exclusive right of user, has been held to be an immediately adjoining owner within the section (*r*). Where there are several owners whose properties immediately adjoin the superfluous land, it is divisible among them rateably, in proportion to the frontage of each property; that is "the length of the line of contact of each property, if such line was made straight from the point of intersection of the boundaries on one side, to the point of intersection of the two boundaries on the other side" (*s*).

(*n*) *L. & S. W. R. Co., App.* v. *Blackmore, resp.*, L. R. 4 E. & Ir. Ap. 610; *Lord Carington* v. *Wycombe R. Co., ubi suprà.*

(*o*) *Elliot* v. *South Devon R. Co.*, 5 Rail. Ca. 500; see *Ex parte the Incumbent of Brompton*, 5 De G. & S. 626.

(*p*) *Lord Carington* v. *Wycombe R. Co.*, L. R. 2 Eq. 825; affd. L. R. 3 Ch. Ap. 377. See too *Coventry* v. *London, Brighton, and S. C. R. Co.*, L. R. 5 Eq. 104, where land in a suburban district was held not to be in a "town." See too *L. & S. W. R. Co., app.*, v. *Blackmore, resp., ubi suprà*, where land at Teddington, close by the railway station, was held not to be in a "town." The exception is omitted from some of the private Acts.

(*q*) *Coventry* v. *London, Brighton, and S. C. R. Co.*, L. R. 5 Eq. 104; *L. & S. W. R. Co., App.*, v. *Blackmore, resp., ubi suprà.*

(*r*) *Coventry* v. *London, Brighton, and S. C. R. Co., ubi suprà.*

(*s*) *Per curiam*, in *Moody* v. *Corbett*, L. R. 1 Q. B. 510. See too *Smith* v. *Smith*, L. R. 3 Ex. 282, 287.

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The right of pre-emption above noticed would seem not to affect a contract entered into with a third party for the sale of superfluous land, if the offer to the parties entitled to pre-emption be made and rejected before conveyance (*t*).

Section 4.

(4.) *Vendor's remedies at Law and in Equity on purchaser's covenants.*

Vendor's remedies at Law and in Equity on purchaser's covenants.

We have already seen that covenants are occasionally entered into as well by the purchaser with the vendor, as by the vendor with the purchaser; and that such covenants will, in Equity, bind a purchaser who accepts the benefit of a conveyance, although he do not execute it (*u*).

Purchaser's covenants, how classified.

Covenants entered into by purchasers are of three descriptions: first, such as relate to interests possessed or acquired by the covenantee in the purchased land, independently of the covenant—*e.g.*, a covenant to pay a rent-charge issuing out of the land, or to maintain a road or other easement over it. Secondly, such as are not connected with any such interests in the purchased land, but which restrict or limit its mode of enjoyment by the purchaser and his representatives,—*e. g*, that the land shall not be built upon or planted, or shall be built upon or planted only in a particular manner—and thirdly covenants relating to the production and custody of the title deeds (*x*).

As respects covenants of the first class.

As respects covenants of the first class it is not perfectly clear (*y*) whether they run with the land, so as to be enforceable by the vendor or his representatives against each successive owner. The hardship and inconvenience which would, in many cases, result from holding that an alienee is to be bound by a covenant of the very existence of which he

(*t*) *London and Greenwich R. Co.* v. *Goodchild*, 8 Jur. 455, V.-C. E.

(*u*) *Suprà*, p. 562.

(*x*) See Third Report of Real Property Commissioners, and Dav. Conv. vol. i., 3rd edit., p. 116, where the Report is given *in extenso*; and see p. 137, *et seq.*

(*y*) *Ibid.*

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may have been ignorant, is frequently alleged as a reason why the burthen of such a covenant should not be held to run with the land. Upon the whole, however, it seems the sounder opinion that such a covenant, if it be reasonable, may be enforced against the successive owners of the land, even though "the assigns" are not expressly named (z): but in order that it may have this effect, it is essential that the alienee, against whom the covenant is sought to be enforced, should have the estate of the original purchaser (a). Where this is not the case—as where, in a conveyance to A. in fee, to such uses as B. shall appoint, and, in default of appointment, to the use of B. in fee, B. covenants, for himself his heirs and assigns, with the vendor for payment of a rent-charge issuing out of the land, and afterwards, in exercise of his power, appoints to C.— it is settled that no action upon the covenant will lie against the alienee (b). In the case just put, C. takes, not as transferee of B.'s estate, to which the liability to pay the rent-charge was annexed; but as appointee under a power, the exercise of which defeated B.'s estate.

Legal privity essential in order that they may be enforceable at Law. *Semble.*

Further, in order that covenants of the first class may be legally enforceable against the alienee of the purchaser, it would seem to be essential that they should be entered into with a legal owner (c). For example, on the sale of an equity of redemption, the purchaser's covenants entered into with the mortgagor would, for the want of privity of estate between him and the purchaser, be mere covenants in gross, and not binding on successive owners of the land (d).

(z) See as to this the first resolution in *Spencer's case*, 1 Sm. L. C., p. 45, 6th edit.; *Minshull* v. *Oakes*, 2 H. & N. 793; *Morland* v. *Cook*, L. R. 6 Eq. 252.

(a) Sug. 580.

(b) *Roach* v. *Wadham*, 6 Ea. 289; see comments on this case in *Child* v. *Douglas*, 2 Jur. N. S. 950, 952; and see Sug. 580 *et seq.*; *Spoor* v. *Green*, L. R. 9 Exch. 99. As to whether the alienee of only a part of, or an undivided interest in, the land would incur a proportionate liability, see and consider *Merceron* v. *Dowson*, 5 B. & C. 479; *Curtis* v. *Spitty*, 1 Bing. N. C. 756, 760.

(c) *Webb* v. *Russell*, 3 Term. Rep. 395. This was the case of a lease, but the same principle seems to apply to the ordinary case of vendor and purchaser.

(d) Sugd. 584; and see further, on the subject of privity of estate, *infrà*, p. 778.

covenants of the second class.

As respects covenants of the second class it appears to be extremely doubtful (*e*) whether they can, at Law, be enforced against an alienee, although "assigns" be expressly named in the covenant (*f*); and the extreme subtlety of

(*e*) See Third Report of Real Property Com.; 2 Myl. & K. 545; and *Ex parte Ralph*, 1 De G. 219.

(*f*) *Sed aliter* in the case of a demise, *Spencer's case*, 5 Rep. 16; 1 Sm. L. C. p. 45, 6th edit. It seems very difficult to support the second resolution in *Spencer's case*, *viz.*, that a covenant which would bind the assignee of a lease, if he were named, does not where he is not named, and the covenant relates to something not *in esse* at the date of the demise, as the erection of a wall upon the land. If, where the covenant relates to "a thing in existence parcel of the demise," the assignee, though not named, is bound by reason of the privity of estate, he ought, for the same reason, to be bound where the covenant relates to a thing not in existence, but which, when it comes into existence, will be annexed to the land; in either case, as he takes the benefit, so ought he also to bear the burthen of the lease. The distinction, however, though the authority for it has frequently been questioned, is too well settled to be easily abolished: see *Minshull* v. *Oakes*, 2 H. & N. 793; 4 Jur. N. S. 169. It has been decided that a covenant by a lessor to build a house on the demised land, *or* to indemnify the lessee against specified liabilities will not, at Law, bind the assignees of the reversion if not expressly named; *Doughty* v. *Bowman*, (in error,) Exch. Ch., affirming the judgment of the Q. B., 11 Q. B. 444; nor *semble*, even if named; see judgment: but a covenant by lessee to repair binds the assignees, although not named; *Martyn* v. *Clue*, 18 Q. B. 661; [illegible] J. Q. B. 147; even where it is in form a covenant to repair buildings not erected at the date of the demise; *Minshull* v. *Oakes*, *ubi suprà*; so, also, a covenant to repair, renew, and replace tenant's fixtures, *Williams* v. *Earle*, L. R. 3 Q. B. 739; (in this case the "assigns" were named, but the decision was not rested on this ground,) so, a covenant to keep buildings situated within the bills of mortality insured against fire, inasmuch as by aid of the 14 Geo. III. c. 78, the covenant for insurance was tantamount to a covenant to repair existing buildings; so, a covenant against a specified user of the land, *Wilkinson* v. *Rogers*, 12 W. R. 119; so, a covenant not to assign without licence, *Williams* v. *Earle*, *ubi suprà*; see also *West* v. *Dobb*, L. R. 4 Q. B. 634; L. R. 5 Q. B. 460; *Varley* v. *Coppard*, L. R. 7 C. P. 505, case of assignment by one of two lessees (partners) of his share to his co-lessee, on a dissolution of the partnership; and see other cases cited in notes on *Spencer's case*, Sm. L. C. p. 45, 6th edit. A condition of re-entry, if the lessee, his executors, administrators, or assigns, should be convicted of an offence against the game laws, does not run with the land so as to enable an assignee of the reversion to maintain ejectment; *Stevens* v. *Copp*, L. R. 4 Exch. 20; compare *Hooper* v. *Clark*, L. R. 2 Q. B. 200. A covenant by the lessor of a public-house, not to build or keep any house for the sale of spirits, &c., within a specified distance of the demised premises, has been held not to run with the reversion so as to be enforceable by an assignee of the lease; *Thomas* v. *Hayward*, L. R. 4 Exch. 311.

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the distinction which is drawn between covenants which do, and those which do not, run with the land at Law, and the little recourse which has been had to the legal remedy of an action upon the covenant, have tended to increase the doubt. Upon the whole, the better opinion seems to be that covenants of the second class, even where not wholly repugnant to the policy of the law, as creating a perpetuity, or as in undue restraint of trade, do not run with the land so as to be enforceable against an alienee of the purchaser.

Equity will restrain a breach by the alienee;

It was at one time even doubted whether a Court of Equity could give to a covenant of this description a more extensive operation than was allowed to it at Law, so as to bind an alienee who was affected with notice of it (*g*): but it is now well settled, that though the covenant may not run with the land at Law, and may not even purport to bind the assigns, the Court will restrain a breach by the alienee (*h*); on the ground that he ought not to be permitted to use the land in a manner inconsistent with the contract into which his vendor entered, and with notice of which he has himself purchased: and the liability, in Equity, of the alienee does not depend upon any question of the technical distinction between covenants which do, and those which do not, run with the land at Law (*i*).

if he have notice of the covenant;

even though it may be invalid at Law.

Nor will Equity refuse to interfere, even though the covenant may be invalid at Law, as creating a perpetuity, or as being in unreasonable restraint of trade. Thus, where a brewer sold a piece of freehold land, and the purchasers

(*g*) *Collins* v. *Plumb*, 16 Ves. 454, 460; *Keppell* v. *Bailey*, 2 Myl. & Ke. 517.

(*h*) *Whatman* v. *Gibson*, 9 Sim. 196; *Mann* v. *Stephens*, 15 Sim. 377; affirmed on appeal, 379; *Tulk* v. *Moxhay*, 11 Beav. 571; 2 Ph. 774; *Patching* v. *Dubbins*, Kay, 1; affirmed by C. A., *Coles* v. *Sims*, Kay. 56; 5 De G. M. & G. 1; and see *Hemingway* v. *Fernandes*, 13 Sim. 228; *Bristow* v. *Wood*, 1 Coll. 480; see also *Schreiber* v. *Creed*, 10 Sim. 9; *Hodson* v. *Coppard*, 29 Beav. 4; *Parker* v. *Whyte*, 1 H. & M. 167; *Robson* v. *Flight*, 13 W. R. 195; *Wilson* v. *Hart*, L. R. 1 Ch. Ap. 463; 2 H. & M. 551; *Catt* v. *Tourle*, L. R. 4 Ch. Ap. 654.

(*i*) *Tulk* v. *Moxhay*, 2 Ph. 774, 777; *Keates* v. *Lyon*, L. R. 4 Ch. Ap. 218, 222; *Jay* v. *Richardson*, 30 Beav. 563; and see *Bowes* v. *Law*, L. R. 9 Eq. 636; *Carter* v. *Williams*, ib. 678

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covenanted that the vendor, his heirs and assigns, should have the exclusive right of supplying beer to any public-house erected upon it, but there was no covenant by the vendor to supply the beer, an alienee of the purchaser was restrained from supplying his own beer to a public-house which he had erected upon the land (*k*).

As to restrictive covenants on sale of a building estate.

A question not unfrequently arises, on the sale of a building estate, as to the devolution of the benefit and burthen of covenants of this description. Where the estate is already laid out for building purposes, and the contemporaneous purchasers enter into mutual restrictive covenants, it is clear that all who take under them with notice are equally bound (*l*); so, where on the sale of a building estate in lots, each purchaser covenants only with the vendor, it would seem that the latter is a trustee in respect of the covenants for the benefit of all the purchasers, and that each has an equity to compel their observance (*m*).

Are not in the nature of a reservation to the vendor.

In *Child* v. *Douglas*, Vice-Chancellor Wood appears, at first, to have considered that where land in settlement is sold, the purchaser's covenants of this description are analogous to a reservation, and enure to the benefit of all parties interested under the settlement (*n*): and that subsequent purchasers of other parts of the estate may enforce them, although they buy in ignorance of their existence. This opinion was expressed upon the granting of an interim injunction, which was afterwards, though on other grounds dissolved by the Court of Appeal (*o*). At the final hearing, the Vice-Chancellor, referring to his former decision, seems to have entertained a doubt as to what are the mutual rights of parties, each of whom has covenanted with the vendor, but who have not covenanted with each other, nor

(*k*) *Catt* v. *Tourle*, L. R. 4 Ch. Ap. 654.

(*l*) *Whatman* v. *Gibson*, 9 Sim. 196; *Coles* v. *Sims*, Kay, 56; 5 De G. M. & G. 1; and see *Western* v. *McDermott*, L. R. 1 Eq. 499; 2 Ch. Ap. 72; *Morland* v. *Cook*, L. R. 6 Eq. 252, a case of partition; and compare *Carter* v. *Williams*, L. R. 9 Eq. 678, where the tenant was held not to have notice of the restrictive covenant.

(*m*) *Eastwood* v. *Lever*, 12 W. R. 195.

(*n*) *Child* v. *Douglas*, Kay, 560.

(*o*) *S. C.*, 5 De G. M. & G. 739.

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taken any covenant from the vendor to themselves (p). In a later case (q) the subject was considered, and the prior authorities reviewed, by the Court of Appeal; and it was laid down, that restrictions of this sort are not in the nature of a reservation to the vendor, devolving on his subsequent purchasers as attached to the property; but are enforceable in Equity, as entirely depending on the contract and intention of the parties; and only, it would seem, where they relate to a dealing with the land, according to some prescribed plan; as where they form part of an existing building scheme: and this seems the sounder view. In the case just referred to, A. sold part of an estate to B., who entered into restrictive covenants for himself, his heirs, and assigns, with A., his heirs, executors, and administrators, as to the buildings to be erected thereon, but there were no similar covenants by A. in respect of the land retained; nor was there any general building scheme affecting the property. A. subsequently sold other portions of the estate to different purchasers, and afterwards bought back from B. the lot which he had sold to him. It was held, in a suit for specific performance, that the benefit of B.'s covenants did not pass to A.'s other purchasers; and that persons claiming through A. could make a good title to the repurchased land, discharged from the covenants. In this case, there was no evidence to show whether the other purchasers bought with notice of B.'s restrictive covenants, or were themselves similarly bound.

Constructive notice of the covenant sufficient to bind the alienee in Equity.

But, in order that an alienee may be bound in Equity, it is not necessary that he should have formal notice of the covenant. Mere constructive notice will be sufficient to bind him (r); and an omission on his part to satisfy himself as to the nature of his vendor's title, may render him liable for an unconscious breach of the covenant. In a late

(p) *S. C.*, 2 Jur. N. S. 950, 952.

(q) *Keates* v. *Lyon*, L. R. 4 Ch. Ap. 218; and see *Harrison* v. *Good*, L. R. 11 Eq. 338, and cases there cited.

(r) *Parker* v. *Whyte*, 1 H. & M. 167; *Robson* v. *Flight*, 13 W. R. 195; but as to not extending the doctrine of constructive notice in this respect, see *Carter* v. *Williams*, L. R. 9 Eq. 678, 682.

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case (s), a yearly tenant, without express notice that his landlord was bound by a covenant not to use the premises as a beershop, was restrained from doing so; upon the ground that although only a yearly tenant, he was as much bound to inquire into his landlord's title, as if he had been the purchaser of a larger interest (t). So, too, an underlessee has been held to be bound by covenants in the original lease of which he had no actual notice, on the ground that he ought to have satisfied himself as to his lessor's title (u): and, in a recent case, where a purchaser of the fee simple entered into restrictive covenants as to the user of the land, and afterwards granted a lease which did not contain any similar prohibition, the lessee, though he had no actual notice of the covenants, was restrained at the suit of the original vendor from committing a breach (x).

Damages may now be awarded under Lord Cairns' Act.

The primary equitable remedy is, as we have seen, an injunction to restrain a breach of the covenant; but now, by Lord Cairns' Act (21 & 22 Vict. sect. 2), the Court may, in all cases where it has jurisdiction to entertain an application for an injunction against a breach of covenant, or against the commission or continuance of any wrongful act, award damages to the party injured, either in addition to, or in substitution for, such injunction; and such damages may be awarded, even though not specifically charged (y): but not after a decree has been already made (z). But, unless the Court had jurisdiction to entertain a suit for injunction at the time when the bill was filed (a), it is now well settled that it cannot give damages (b): and it would seem to be

(s) *Wilson* v. *Hart*, 2 H. & M. 551; affd. L. R. 1 Ch. Ap. 463; in this case the tenant appears to have known that there was *some* restriction; compare *Williams* v. *Carter*, *ubi suprà*.

(t) See too *Clements* v. *Welles*, L.R. 1 Eq. 200; *Morland* v. *Cook*, L. R. 6 Eq. 252; *Feilden* v. *Slater*, L. R. 7 Eq. 523.

(u) *Parker* v. *Whyte*, 1 H. & M. 107; and see *Wilson* v. *Hart*, L. R. 1 Ch. Ap. 463; 2 H. & M. 551; and *Clements* v. *Welles*, *ubi suprà*.

(x) *Feilden* v. *Slater*, *ubi suprà*.

(y) *Calton* v. *Wyld*, 32 Beav. 266.

(z) *Corporation of Hythe* v. *East*, L. R. 1 Eq. 620.

(a) See *Davenport* v. *Rylands*, L. R. 1 Eq. 302, where an infringed patent expired pending the litigation.

(b) *Hindley* v. *Emery*, L. R. 1 Eq. 52; *Durell* v. *Pritchard*, L. R. 2 Ch. Ap. 244; *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270.

discretionary with the Court, whether it will award damages, or leave the plaintiff to obtain them at Law (*c*). Where the plaintiff is entitled to an injunction, the Court will, in addition, award damages in respect of past breaches of the covenant (*d*); or in substitution, where, since the filing of the bill, an injunction has become impossible (*e*); or where the plaintiff has been guilty of laches (*f*); or where damages are the more appropriate remedy (*g*). When the Judicature Act, 1873, comes into operation, which will probably happen before these pages come before the Profession, the jurisdiction to award damages will not, it is conceived, any longer depend on the case being a proper one for relief by way of injunction (*h*).

No remedy by injunction in the County Courts.

We may here remark that the power of the County Courts, under the Acts, conferring on them an equitable jurisdiction to issue orders in the nature of injunctions, is confined to cases where an injunction is requisite for granting relief under their other heads of equitable jurisdiction (*i*): so that, even in cases where the injury sustained by a breach of covenant is merely nominal, the proper remedy is still by a suit in the High Court of Chancery.

When the Court will refuse relief.

The Court will not, in general, grant an injunction where it is evident that no real damage is likely to be sustained, or where the circumstances which were contemplated when the covenant was entered into no longer exist. Thus, the Court has refused to enforce specific performance of a covenant against the erection of buildings, where the plaintiff had himself erected buildings, the effect of which was to destroy those very advantages which the covenant was intended to maintain: so, where the leases of an estate contained covenants by the lessees which were intended to be for the

(*c*) *Durell* v. *Pritchard*, *ubi suprà*.
(*d*) *Hindley* v. *Emery*, *ubi suprà*.
(*e*) *Culton* v. *Wyld*, 32 Beav. 266.
(*f*) *Senior* v. *Pawson*, L. R. 3 Eq. 330, not a case under a covenant.
(*g*) *Martin* v. *Headon*, L. R. 2 Eq. 425. As to the mode of assessing damages, see sect. 2, and Morgan's Ch. Acts, 264, 265.
(*h*) 36 & 37 Vict. c. 66, sect. 21.
(*i*) See 28 & 29 Vict. c. 99, s. 1.

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general benefit of the property (*e.g.*, covenants to build upon an uniform plan), and the landlord let loose some of his tenants, the Court would not at his suit restrain a similar infringement of the covenants by the others (*k*). So, where on the sale of a building estate in lots, the purchasers entered into restrictive covenants with the vendor, and also *inter se*, and the vendor permitted, without interference, material breaches of the covenant to be committed by some of the purchasers, it was held that he could not enforce them against a purchaser who bought *after* the breaches had been committed; and the fact that there were mutual covenants between the purchasers was not considered material (*l*). Where a lease of a house contained a covenant by the lessee to use it as a private dwelling-house only, with a proviso that, if any of the adjoining houses of the lessor should be turned into shops, the lessee might convert the demised premises to a similar use, and one of the adjoining houses was subsequently let to a photographer, who, without making any structural or architectural alterations in the building, used the front ground-floor room for the display and sale of photographs and albums, it was held that this was a conversion into a shop, and that the lessee was discharged from his covenant (*m*).

In doubtful cases.

Restrictive covenants of this kind, being as against common right, are in doubtful cases construed favourably to the covenantor. Thus, where the covenant was not to use the building "as a public-house for the sale of beer, wine, malt liquors, or spirits," it was held that the sale of beer by retail, under a licence not to be drunk on the premises, was not a breach of the covenant (*n*). So, a covenant not to be engaged in a specified trade, "or in any matter relating thereto," within a given district, does not prevent the covenantor lending money to persons engaged in that trade

(*k*) *Roper* v. *Williams*, T. & R. 18.

(*l*) *Peek* v. *Matthews*, L. R. 3 Eq. 515.

(*m*) *Wilkinson* v. *Rogers*, 2 De G. J. & S. 62.

(*n*) *Pease* v. *Coats*, L. R. 2 Eq. 688, which see, as to the meaning of the word "public-house;" see, too *Feilden* v. *Slater*, L. R. 7 Eq. 523.

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within the prohibited limits; even though the mortgagor's only means of re-payment are out of the profits of the trade (o); nor does it prevent him from selling houses within the district for the purposes of the prohibited trade (p). But a covenant in a lease of cellars under a chapel, that they shall be used "as for wine-cellars only, and *not for interment or burial*" has been held to be broken by their user for the storage and sale of beer and spirits (q).

Where there has been acquiescence.

Acquiescence, or even participation, in trivial breaches of the covenant, will not of itself deprive a person injured by a substantial breach of his equitable remedy. Thus, in a modern case, where each of several owners of houses in a row had entered into restrictive covenants with the owner of the building estate, as to building or planting trees upon their properties, an injunction was granted at the suit of the owner of one house restraining a breach of the building covenants, notwithstanding that the plaintiff and the other owners had committed breaches of the covenants as to planting, which had not been interfered with (r); and it was held that he might obtain relief without bringing the other owners before the Court (s); nor is the principle of acquiescence to be carried so far as to hold that a man who has permitted one infringement is bound to permit another (t). What degree of acquiescence will be a sufficient bar to relief, must, in each case, depend upon the nature of the breach; as, *e. g.*, whether it is incurable, or merely temporary (u). In one case, where the covenant was not to use the house "as a public-house," and the breach was manifest, a delay of

(o) *Bird* v. *Lake*, 1 H. & M. 338.

(p) *Ib.*

(q) *Turner* v. *Marriott*, V.-C. K., 31 July, 1866. As to covenants in restraint of trade, see *Leather Cloth Co.* v. *Lorsont*, L. R. 9 Eq. 345.

(r) *Western* v. *McDermott*, L. R. 1 Eq. 499; affd. 2 Ch. Ap. 72. See this case as to the covenants running with the land, *et quære*.

(s) But see *Eastwood* v. *Lever*, 12 W. R. 195; and see *Thompson* v. *Hakewill*, a case at Law.

(t) Per L. J. Turner in *Lloyd* v. *L. C. & D. R. Co.*, 2 De G. & S. 578.

(u) See *Kemp* v. *Sober*, 1 Sim. N. R. 517; and compare *Duke of Bedford* v. *Trustees of British Museum*, 2 Myl. & Ke. 552; *Roper* v. *Williams*, Turn. & R. 18; *Peck* v. *Matthews*, L. R. 3 Eq. 515.

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nearly six months did not deprive the vendor of his relief (x). But this case depended on special circumstances; and where there is a substantial breach, as, *e. g.*, where, in contravention of the covenant, a noxious trade is being carried on, or a new building is being erected, or a structural or architectural alteration is being made in an existing building, a far shorter period will suffice to bar the title to relief (y).

Whether they can be released.

It seems to be the better opinion that a lessor or vendor cannot effectually release covenants of this class to the prejudice of intermediate lessees or purchasers of other parts of the estate; nor, *à fortiori*, to the prejudice of prior lessees or purchasers who have stipulated for the insertion of such provisions in future leases or conveyances (z).

Relief granted though the damage sustained is trivial.

And, although the Court will not entertain frivolous applications, it yet will, in any doubtful case, restrain a violation of a deliberate engagement: thus, where an agreement had been entered into between neighbouring landowners as to their mutual user of rights of water, the Court restrained a clear violation of the contract by one of the parties, without entertaining the question as to how far or whether the other was prejudiced thereby (a): and in another case, the Court, with reference to an infringement of a covenant by using adjoining premises as a school, well observed that "the feeling of anxiety is damage" (b); and it must be clear that there is no appreciable or, at all events, no substantial damage, before the Court will, merely on the ground of the

(x) *Mitchell* v. *Steward*, L. R. 1 Eq. 543.

(y) See further as to the effect of delay and acquiescence on the equitable right to relief for breach of covenant, Kerr on Injunctions, p. 496, and cases there cited.

(z) *Child* v. *Douglas*, Kay, 572; 5 De G. M. & G. 739; 2 Jur. N. S. 950, 952. But see *Keates* v. *Lyon*, L. R. 4 Ch. Ap. 218; *et vide sup.*, p. 769.

(a) *Dickenson* v. *G. J. C. C.*, 15 Beav. 260; *Tipping* v. *Eckersley*, 2 Kay & J. 264; *Johnstone* v. *Hall*, ib. 420.

(b) *Kemp* v. *Sober*, 1 Sim. N. R. 520. As to keeping a school being a breach of a covenant to use the premises as a private dwelling-house only, see also *Wickenden* v. *Webster*, 2 Jur. N. S. 590; *Johnstone* v. *Hall*, ib. 780; 2 K. & J. 414.

smallness of the damage, withhold its hand from enforcing the covenants (c).

It has been held that the establishment of a national school is not a "nuisance" within the strict legal meaning of the term (d).

Covenants of third class—remedies upon.

As to covenants of the third description, *viz.*, relating to title deeds, the right to enforce them at Law against an alienee (as with covenants of the first kind) may perhaps depend upon his having the estate of the original covenantor (e): but an alienee who bought with notice of the covenant would be bound in Equity to produce the deeds (f); and it seems probable that the benefit of such a covenant by a purchaser would at Law run with the land retained by the vendor (g).

Covenantor and his representatives liable on covenants in gross.

The covenantor and his real and personal representatives may, even after alienation (h), be sued upon covenants of any of the above kinds, although they may not bind the alienees of the land (i).

Assignee liable on covenant simply collateral.

Upon a covenant simply collateral to the land—*e. g*, to pay a sum of money or to make compensation for damage—the assignee of the covenantor is not liable although expressly

(c) *Per* L. J. Turner in *Lloyd* v. *London, Chatham, and Dover Ry. Co.*, 2 De G. Jo. & S. 580; see, too *Western* v. *McDermott*, L. R. 1 Eq. 499. See *Johnstone* v. *Hall*, 2 K. & Jo. 414, where relief was refused in a suit by a remainderman, no special damage being proved.

(d) *Harrison* v. *Good*, L. R. 11 Eq. 338, where the covenant was not to do or suffer anything which might be deemed a nuisance; but see *Walter* v. *Selfe*, 4 De G. & Sm. 315; *Hole* v. *Barlow*, 4 C. B. (N. S.) 334; and see judgment of Sir W. Erle in *Brand* v. *Hammersmith & City R. Co.*, L. R. 2, Q. B. 246, 248. As to what is a nuisance, see Kerr on injunction, 332, 333.

(e) As to which, *vide infrà*, p. 778. and see Sug. 453, n., and the remarks on *Barclay* v. *Raine*, 1 Sim. & S. 449; and see 9 Jarm. Conv. 98, 356.

(f) See Sug. 453; and, as to the general equitable right to production, independently of any covenant, *vide suprà*, Ch. IX., s. 2.

(g) See Mr. Jarman's note, 9 Jarm. Conv. by S. 356, *et seq.*; and Third Rep. of Real Prop. Com. 52; but see Sug. 453.

(h) *Millar* v. *Small*, 1 Macq. H. L. 345; and see *King's Coll., Aberdeen* v. *Hay*, *ib.* 526.

(i) See and consider *Stokes* v. *Russell*, 3 T. R. 678.

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named (*k*): nor can the assignee of the covenantee sue in his own name on such a covenant (*l*).

Liability of covenantee, how affected by bankruptcy;

By the 145th section of the Bankrupt Law Consolidation Act, 1849 (*m*), [which was not repealed by the Act of 1861], it was provided that when the assignees of any bankrupt, who was entitled to land, under a conveyance to him in fee, or under an agreement for such a conveyance, subject to any perpetual yearly rent thereby reserved, should elect to take the land or the benefit of the conveyance or agreement, the bankrupt was not to be liable to pay any rent accruing after the issuing of the fiat or filing of the petition, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants and agreements in the conveyance or agreement: and if the assignees declined to take the land or the benefit of the conveyance or agreement, he was not to be liable if, within fourteen days after notice of their having so declined, he delivered up the conveyance or agreement to the person then entitled to the rent, or having so agreed to convey: and if the assignees did not elect, on request, any person entitled to the rent, or having so conveyed or agreed to convey, or any person claiming under him, might apply to the Court: and the Court might order them to elect and deliver up such conveyance or agreement, in case they should decline the same, and the possession of the premises: or might make such other order therein as it should think fit.

under the recent Act.

Under the Act of 1869 as we have already seen, where the property of the bankrupt consists of land of any tenure burdened with onerous covenants, the trustee may within a limited time disclaim it, notwithstanding prior acts of ownership; but any person injured by the disclaimer is to be

(*k*) *Spencer's case*, 5 Rep. 16.

(*l*) *Canham* v. *Rust*, 8 Taunt. 227; *Milnes* v. *Branch*, 5 Mau. & S. 411. As to joint and several covenants, see *Bradburne* v. *Botfield*, 14 M. & W. 559, 574; *Martyn* v. *Williams*, 1 H. & N. 817; 26 L. J. (Ex.) 117; *Thompson* v. *Hakewill*, 11 Jur. N. S. 732; *Hooper* v. *Clark*, L. R. 2 Q. B. 200; *Thomas* v. *Hayward*, L. R. 4 Exch. 311; and see Platt on Leases, 133, 135.

(*m*) 12 & 13 Vict. c. 106; and see 24 & 25 Vict. c. 134, s. 131.

deemed a creditor of the bankrupt to the extent of such injury; and his debt is made proveable in the bankruptcy (n).

Not affected by alienation.

Where land is sold in consideration of a perpetual rent-charge which the purchaser covenants to pay, he and his estate remain for ever liable under the covenant, although the land itself be sold and conveyed, *cum onere*, to a sub-purchaser (o).

(5.) *Purchaser's remedies on vendor's covenants.*

Section I

Purchaser's general remedies for defects after conveyance depend on vendor's covenants.

With some few special exceptions (p), a purchaser, after the conveyance is executed by all necessary parties, has no remedy at Law or in Equity in respect of any defects either in the title (q) to, or quantity or quality (r) of, the estate, which are not covered by the vendor's covenants.

And to consider first the legal rights of the purchaser and his representatives under the covenants for title.

Alienees not bound.

Such covenants, it may be observed, bind only the covenantor and his representatives; and not alienees as such: it is therefore only necessary to consider who are entitled to the benefit of them.

Benefit of covenants for

Such covenants may be enforced at Law, not only by the

(n) 32 & 33 Vict. c. 71, ss. 23, 24; and *vide suprà*, p. 84.

(o) *Millar* v. *Small*, 1 Macq. H. L. C. 345; *King's Coll., Aberdeen*, v. *Hay*, *ib.* 526.

(p) *Infrà.*

(q) See *Lysney* v. *Selby*, Lord Raym. p. 1119; *Bree* v. *Holbech*, Dougl. 632 (case of an innocent transfer of a forged security); *Cottam* v. *E. C. R. Co.*, 1 J. & H. 243, a purchase under a deed partially forged; *Ex parte Swan*, 30 L. J. N. S. C. P. 113; *Taylor* v. *Midland R. Co.*, 28 Beav. 287 where the person whose name was forged in a transfer of shares obtained relief against the company; see, too, *Cripps* v. *Reade*, 6 T. R. 606; *Serjeant Maynard's case*, Freem. C. C. 1; *Anon.*, *ibid.* p. 106; *Thomas* v. *Powell*, 2 Cox, 394; *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233, 235; *M'Culloch* v. *Gregory*, 1 K. & J. 291; case of error in abstract.

(r) *Newham* v. *May*, 13 Pri. 749; case of rental misstated, yet bill for compensation dismissed; *Clare* v. *Lamb*, L. R. 10 C. P. 334. But see *Bos* v. *Helsham*, L. R. 2 Ex. 72, where compensation was allowed; and *vide infrà.*

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title runs with seisin,

covenantee and his representatives, but by alienees who claim under the seisin vested in the original covenantee, or, as it is expressed, in privity of estate (s): for instance, if A. convey land to B. and his heirs to certain specified uses, or to such uses as C. shall appoint, and covenant for title with B. and his heirs, the right to sue upon the covenants will go with the seisin to the persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C. under his power (t): so, if the conveyance were to B. and his heirs, to such uses as C. shall appoint, and in default of appointment to the use of C. in fee, and A. covenant with C. and his heirs, and C. (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee can sue upon A.'s covenants (u): so, if C., in exercise of his power, appoint the land to the use of D., and covenant with him and his heirs for title, C.'s covenants can be sued upon by the aliences of D.: and in the two former cases, the right to sue upon A.'s covenants, and, in the last case, the right to sue upon C.'s covenants, will go with the land to all successive owners (v): and the heir or assignee although not named in the covenants for title may nevertheless sue thereupon (x).

to *cestui que use* and his alienees.

So covenants with *cestui que use* will run with his estate.

But cannot be sued on by alienee not claiming in privity of estate.

But, in the case last supposed, D.'s alienee, although he might sue upon C.'s covenant, could not sue upon A.'s; as he would not take the estate of A.'s covenantee (y): so if C., instead of appointing to the use of D., were to appoint to such uses as D. should appoint, D.'s appointee could not sue upon C.'s covenant: for he would not take the estate of C.'s covenantee.

Whether there must be privity of

Lord St. Leonards suggests a doubt (z) whether the doctrine of privity of estate may not apply as well to covenantor as to

(s) 3 T. R. 402.

(t) See Sug. 578.

(u) See Sug. 579, where the point is held to be free from doubt; but see Third Report of Real Prop. Com. 52.

(v) See Sug. 578, *et seq.*

(x) *Spencer's case*, 5 Rep. 16; *Lougher* v. *Williams*, 2 Lev. 92; see 2 Bac. Abr. 349.

(y) *Roach* v. *Wadham*, 6 East, 289.

(z) Sug. 581.

covenantee; that is, whether, in order that the alienee may sue, he must not only claim the estate of the covenantee, but also claim it under a conveyance or appointment by the covenantor; which, in a large proportion of conveyancing transactions, is not the case. The Real Property Commissioners consider that the doubt is set at rest by authority (a); and this conclusion is usually (it is believed) acted on in practice.

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estate, as well with covenantor as covenantee.

And the benefit of the covenants will go with the estate of the original covenantee, although leasehold (b), or copyhold (c): nor is it clearly essential that the estate should be actually vested in the covenantee at the date of the covenant. Where, as is frequently the case on a sale of copyholds, the covenants for title were contained in the deed of covenant to surrender, V.-C. Shadwell seems to have entertained no doubt that the covenants would run with the land; inasmuch as the covenant to surrender, and the surrender, are parts of the same transaction (d). But this doctrine seems open to remark, and is not always relied on in practice (e).

Covenants run with leaseholds or copyholds.

Privity at date of covenant, whether essential.

Where land is divided, the benefit of attendant covenants will, it seems, go to each alienee in respect of the portion of land taken by him (f): so, where the *estate* is divided as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned to the extent of his estate (g): so, where the estate is cut up into undivided shares (h).

Benefit of covenants apportioned with land and estate.

In a late case (i), on a partition of land lying below the

In case of partition.

(a) See Third Rep. p. 52, and 9 Jarm. Conv. by S. 356; Smith's L.C. 3rd edit. 30.

(b) *Noke* v. *Awder*, Cro. El. 436, and *Lewis* v. *Campbell*, 8 Taunt. 715; *Campbell* v. *Lewis*, 3 B. & Ald. 392.

(c) See *Riddell* v. *Riddell*, 7 Sim. 529.

(d) *Ibid.* 534, 535, and Sug. 579.

(e) See Dav. Conv. vol. i. p. 111; vol. ii. pt. 1, p. 159.

(f) See Sug. 586, 592; and 9 Jarm. Conv. S. 366; and *Twynam* v. *Pickard*, 2 B. & Ald. 105.

(g) See Jarm. Conv. by S. 404; *Noble* v. *Cass*, 2 Sim. 343.

(h) *Badeley* v. *Vigurs*, 4 El. & B. 71.

(i) *Morland* v. *Cook*, L. R. 6 Eq. 252.

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sea level, the deed contained mutual covenants by the parceners to contribute, in a rateable proportion, to the expense of maintaining a sea-wall then in existence; but the "assigns" were not named: and the question was raised, but not decided, whether the covenant ran with the land.

Will run with incorporeal heredita- ments.

Covenants will run with tithes as with land (*j*); and, in this respect, there seems to be no distinction between tithes and other incorporeal hereditaments (*k*). In a recent case, where there was a lease of a right of shooting, with a covenant by the lessee to leave the land well stocked with game at the end of the term, the assignee of the reversion was held entitled to sue, in his own name, for breach of the covenant (*l*).

Remedy on covenants in conveyance of equitable estate.

Where the estate is merely equitable, there can be no assignee at Law, and the covenants cannot be enforced at Law by an equitable assignee; so, if the conveyance, although intended so to do, do not in fact pass any legal estate, the assignee cannot sue (*m*); but in either case, the assignee, although unable to sue in his own name, would probably be entitled to sue in the name of the original covenantee (*n*).

Assignee may sue in name of covenantee.

Remedy in Equity.

Equity will assist a covenantee who has lost his legal remedy by the contrivance of the covenantor (*o*); but it will not, as a mode of enforcing the covenant for quiet enjoyment, interfere by injunction against an illegal distress by the vendor after conveyance (*p*).

It is common upon sales, even by the Court of Chancery, to stipulate that the absence of covenants for title running with the land shall not be made the subject of objection or requisiton by the purchaser; and such condition is not

(*j*) *Bally* v. *Wells*, 3 Wils. 25; *Martyn* v. *Williams*, 1 H. & N. 817; *Earl of Egremont* v. *Keene*, 2 Jones's Ex. Rep. (Ireland) 307, a case of tolls.

(*k*) See 9 Jarm. Conv. by S. 360; and Sug. 591.

(*l*) *Hooper* v. *Clark*, L. R. 2 Q. B. 200.

(*m*) 9 Jarm. Conv. by S. 366.

(*n*) See *Riddell* v. *Riddell*, 7 Sim. 529.

(*o*) *Thornton* v. *Court*, 3 De G. M. & G. 293, C. A.

(*p*) *Drake* v. *West*, 22 L. J. 375, V.-C. W.

found to have any depreciatory effect. It is however inserted rather *ex abundante cauteld* than as a matter of necessity; for there is no authority for holding that the absence of such a covenant constitutes a valid ground of objection to the title.

As to breach of covenants for title.

In considering what amounts to a breach of the several usual covenants for title, it may be premised, that, as respects the covenants for seisin in fee, (or, in the case of a lease, that the lease is valid,) and for right to convey, surrender, or assign, and also the usual trustee's covenants against incumbrances, the same, if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them (*q*); so that the Statute of Limitations immediately begins to run in favour of the covenantor: and this, although the covenantee be in ignorance of the breach (*r*); and be kept in such ignorance by the fraud of the covenantor (*s*). Whereas the usual covenants, that the purchaser shall enjoy the estate (*t*) free from incumbrances (*u*), and for further assurance, can only be broken by subsequent events; and the Statute does not begin to run until there is an actual breach, and then only in respect of that particular breach (*x*).

Statute of Limitations runs, from what time.

Covenants for seisin and right to convey, how broken.

A covenant that the vendor is seised in fee of an estate conveyed as freehold, is, of course, broken, if the estate be copyhold (*y*); and a covenant that the vendor and another conveying party have good right to convey, is broken, if such other party, although having the estate, be personally incompetent to transfer it (*z*).

In a recent case, where leaseholds were assigned for the

(*q*) See *Salman* v. *Bradshaw*, Cro. Jac. 304: as to whether recitals of the vendor's title in the conveyance can estop the purchaser, *vide suprà*, p. 523; see too and consider *Spoor* v. *Green*, L. R. 9 Exch. 99.

(*r*) *Short* v. *M'Carthy*, 3 B. & Ald. 626.

(*s*) *Imperial Gas Co.* v. *London Gas Co.*, 10 Exch. 39.

(*t*) See *Ireland* v. *Bircham*, 2 Sc. 207.

(*u*) *Vane* v. *Lord Barnard*, Gilb. 6, 8.

(*x*) See 9 Jarm. Conv. by S. 402.

(*y*) *Gray* v. *Briscoe*, Noy, 142; the word "not" in the report is evidently a clerical error; see context.

(*z*) *Nash* v. *Aston*, Sir T. Jones, 195.

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lives of A. B. and C., and the survivors and survivor of them, and the assignor covenanted that the lease was valid and subsisting "for the three lives, and the survivors and survivor of them," and B. was dead at the date of the deed, the Court of Exchequer Chamber held that this was merely a covenant that the lease was subsisting, not that the three lives were still in existence (a).

How usually restricted.

The covenant for seisin or right to convey is usually restricted to the acts of the covenantor where he has acquired the estate by purchase, and to the acts of himself, his ancestors or testators, where he claims by descent or devise; and, so qualified, is merely a warranty on his part "that he sells the estate in the same plight that he received it, and not in any degree made worse by him" (b). Even without express words of restriction, the form of the deed may show that the covenant was intended to be qualified.

May be qualified, without express words.

Purchaser may sue before eviction.

The purchaser may, if he please, bring an action immediately on discovering the defect in title, without waiting to be evicted or disturbed (c); or may wait until eviction (d).

Covenant for quiet enjoyment and freedom from incumbrances.

The common covenant for quiet enjoyment (e) is broken by a suit in Equity, although equitable disturbances be not specified (f); or by the obstruction of a necessary right of way (g), or a verbal notice to tenants to pay rent to the adverse claimant (h), or a claim in respect of subsequent arrears of a quit rent incident to the tenure of the property (i).

How broken.

The covenant, if general, is not broken by a *wrongful*

(a) *Coates* v. *Collins*, L. R. 7 Q. B. 144, affirming, L. R. 6 Q. B. 469.

(b) Per Lord Eldon, in *Browning* v. *Wright*, 2 B. & P. 22.

(c) Sug. 610.

(d) See *King* v. *Jones*, 5 Taunt. 418, 428.

(e) As to a clause of warranty being equivalent thereto, see *Williams* v. *Burrell*, 1 C. B. 402.

(f) *Hunt* v. *Danvers*, T. Raym. 370; and see 2 Ventr. 214; Sug. 600.

(g) *Andrews* v. *Paradise*, 8 Mod. 318; *Morris* v. *Edgington*, 3 Taunt. 24.

(h) T. Raym. 371.

(i) *Hammond* v. *Hill*, Com. R. 180 (the covenant *specified* rents and rent-charges).

claim or eviction (*k*), unless it be the act of the covenantor himself or his heirs or executors (if named) (*l*); in which case the wrongful act, if intended as a claim to title (*m*), is a breach even of a covenant against lawful disturbances (*n*); and a covenant in terms extending to pretended claims (*o*), or a general covenant against disturbances by specified individuals (*p*), or by claimants in general (with a specified exception) (*q*), is broken by a wrongful disturbance. It was held in one case (*r*), that covenants for seisin in fee, and good right to convey free from incumbrances, were not broken when parties were, at the date of the conveyance, in actual possession of part of the estate under leases made by a stranger under a mistake: but the decision seems to be of very doubtful authority (*s*). In a recent case the ordinary covenants for title and quiet enjoyment were held by a majority of the Court of Exchequer, not to be broken by the subsistence of a mining lease, where the purchaser, when he took his conveyance, knew that the minerals were substantially worked out, or by a subsidence of the surface, caused by the previous workings, although the party suing on the covenants, who was an assignee of the purchaser, did not know of the existence of the lease, or that the minerals had been worked (*t*).

Meaning of particular expressions—"acts;" "means;"

The word "acts" means something done by the person against whose acts the covenant is made; and the word "means" has a similar meaning, *viz.*, something proceeding from the person covenanting (*u*) or the person against whose

(*k*) See *Kirby* v. *Hansaker*, Cro. Jac. 315; *Dudley* v. *Folliott*, 3 T. R. 584.

(*l*) See 9 Jarm. Conv. by S. 376; *Forte* v. *Vine*, 2 Rol. R. 21 (misprinted).

(*m*) See *Penn* v. *Glover*, Cro. El. 421; *Morgan* v. *Hunt*, 2 Vent. 213; *Lloyd* v. *Tomkies*, 1 T. R. 671; and Lord Ellenborough's remarks in *Seddon* v. *Senate*, 13 East, 72.

(*n*) *Lloyd* v. *Tomkies*, *ubi suprà*.

(*o*) *Chaplain* v. *Southgate*, 10 Mod. 384.

(*p*) *Foster* d. *Wilson* v. *Mapes*, Cro. El. 212; *Perry* v. *Edwards*, 1 Str. 400; *Nash* v. *Palmer*, 5 Mau. & S. 374; *Fowle* v. *Welsh*, 1 B. & C. 29.

(*q*) *Woodroff* v. *Greenwood*, Cro. El. 518.

(*r*) *Jerritt* v. *Weare*, 3 Pri. 575.

(*s*) See Sug. 601.

(*t*) *Spoor* v. *Green*, Law R. 9 Exch. 99, *sed quære*.

(*u*) *Per Cur.* in *Spencer* v. *Marriott*, 1 B. & C. 459; and see *Dennett* v. *Atherton*, L. R. 7 Q. B. 316.

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acts, &c., the covenant is made. Where A. procured a fine to be levied to himself and his wife and his own heirs, an entry by the widow was held to be a breach of his covenant with a lessee for quiet enjoyment against himself (A.) and all persons claiming by his "means" (*x*).

"claiming under;"

So, a covenant for quiet enjoyment against all persons claiming "under" the covenantor, is broken by an entry by his widow (*y*), or by a person claiming under the prior exercise by the covenantor of a power of appointment, although the estate was never vested in the covenantor (*z*); or under a joint appointment by the covenantor and A. B. (*a*); or by mortgagees of a term which was created with his concurrence, though the estate did not move from him (*b*): but a covenant for quiet enjoyment against persons claiming "by, from, or under" him, seems not to extend to persons claiming by title paramount in respect of his mere default (*c*); although it may be otherwise where the paramount title is brought into operation by his "acts" (*d*).

The ordinary covenant for quiet enjoyment, we may observe, is to be regarded merely as a covenant to secure title and possession, not as a guarantee that the lessee may use the land for any purpose he pleases. Thus in a recent case, where A., on taking a conveyance in fee, covenanted with B., his vendor, not to carry on the trade of a beer-seller on the premises, and afterwards leased part of the property without any restriction as to this particular trade, though other specified trades were expressly prohibited, and the

(*x*) *Butler* v. *Swinerton*, Cro. Jac. 657.

(*y*) *Anon.* Godb. 333.

(*z*) *Hurd* v. *Fletcher*, Doug. 43; *Evans* v. *Vaughan*, 4 B. & C. 261, 267.

(*a*) *Calvert* v. *Sebright*, 15 Beav. 156.

(*b*) *Carpenter* v. *Parker*, 3 C. B. N. S. 206; 27 L. J. N. S. C. P. 78.

(*c*) *Stanley* v. *Hayes*, 2 G. & Dav. 411; 3 Q. B. 105: a case of distress for land tax which the covenantor ought to have paid; but see *Ireland* v. *Bircham*, 2 Sc. 207.

(*d*) See a note to 9 Jarm. Conv. by S. 380, where the learned editor, coming to a different conclusion, contends that for this purpose acts and defaults are identical, as to which, query; and see Sug. 603, where the decision in *Stanley* v. *Hayes* is approved of.

lease was assigned to C., who without notice of A.'s covenant, opened and carried on a beer-shop, until he was restrained by injunction at the suit of B., it was held by the Court of Exchequer Chamber in an action by C. against A. for breach of the covenant for quiet enjoyment, that the covenant did not amount to a warranty to the lessee that he might use the premises for any purpose not falling within the prohibited trades (*e*).

"default;"

A covenant for quiet enjoyment against persons claiming "by or through his default," would, it appears, be broken by an entry by parties whose title he had it in his own power to bar;—*e.g.*, if he were tenant in tail in possession, and the entry were made by remaindermen (*f*);—and such a covenant has been held to extend to claims in respect of arrears of quit rent, although they accrued due before he acquired the estate (*g*): the decision, however, is disapproved of by Lord St. Leonards (*h*). But the omission by the covenantor to acquire from other parties a valid title, although he knew the defect, is not a "neglect or default" within the meaning of such a covenant (*i*).

"neglect or default;"

"permitted or suffered;"

A covenant that the covenantor has not knowingly or willingly "permitted or suffered" (*k*) any act, &c., does not extend to a defect in title occasioned by the act of God, *e.g.*, the death of the *cestui que vie* (*l*); or to an act by others which the covenantor was a party to, but had no power to prevent; *e.g.*, a mortgage in which he (as trustee to bar dower) has concurred (*m*): but, of course, in such a case, the

(*e*) *Dennett* v. *Atherton*, L. R. 7 Q. B. 316; see and consider this case.

(*f*) *Lady Cavan* v. *Pulteney*, 2 Ves. J. 544.

(*g*) See *Howes* v. *Brushfield*, 3 East, 491.

(*h*) Sug. 602.

(*i*) See *Woodhouse* v. *Jenkins*, 9 Bing. 431; *Ireland* v. *Bircham*, 2 Sc. 207.

(*k*) As to the word "suffer," having a passive, and not an active, signification, see *Roffey* v. *Bent*, L. R. 3 Eq. 759; see, too, a case of mistake in parcels, *Wild* v. *Hillas*, 4 Jur. N. S. 1166.

(*l*) *Stannard* v. *Forbes*, 6 Ad. & E. 572.

(*m*) *Hobson* v. *Middleton*, 6 B. & C. 295; 9 D. & R. 249.

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covenant would have been broken had it proceeded in the usual form, "or been party or privy to" (n).

"party or privy to."

Acknowledgment which has prevented apparent from becoming real easement.

In one case, where a house was sold with all easements &c., and certain lights which had been actually used for upwards of the statutory period, were apparently subsisting easements at the time of sale, it was held that the fact of the vendor having signed a memorandum which prevented the Statute from running, did not amount to a breach of the ordinary covenant: inasmuch as such covenant referred only to actual and not to apparent easements (o).

As to covenants against known defects.

It seems doubtful whether covenants for title would be held to extend to a defect known to the purchaser at the time of their being entered into (p): and it has been suggested (q) that such a defect should be particularly specified, and that, unless it be apparent on the face of the conveyance, the covenant should be entered into by a separate instrument. If, however, the defect be not so apparent, it is conceived that a memorandum, signed by the covenantor and admitting that the defect was known, and intended to be provided for by the covenants, would be sufficient: for as the covenantor, seeking to escape the general terms of the covenant, must then, by evidence, dehors the deed, show that the covenantee had notice of the defect, so the covenantee might, in like manner, show that the defect, though known, was not intended to be excepted (r): but the defect, if apparent on the conveyance, should be specified in the covenants; or be noticed in the recitals as intended to be covered by the covenants.

Qualification in words of grant.

It has been held, in the case of a lease, that the effect of a covenant for quiet enjoyment as against parties claiming

(n) See 6 B. & C. 303.

(o) *Thackeray* v. *Wood*, 5 Best & Smith, 325; affirmed, 6 B. & S. 766; *S. C.* 10 Jur. N. S. 877; *sed quære.*

(p) See Butler's note to Co. Litt. 384 a; *Ogilvie* v. *Foljambe*, 3 Mer. 53; and see *Spoor* v. *Green*, L. R. 9 Exch. 99, *suprà*, p.

(q) Butler's note, *ubi suprà*; Sug. 573; and 9 Jarm. Conv. by S. 381.

(r) See 1 Sim. & S. 445.

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under the lessor is not restricted by the introduction into the words of demise of the qualification "so far as in his power lies or as he lawfully can or may;" there being nothing else on the face of the lease to intimate that there was any doubt as to the title (*s*).

Case of wrongful eviction.

It is well settled that a general covenant for quiet enjoyment is confined to a lawful, and does not extend to a wrongful, eviction (*t*): but when the covenant is against the acts of particular persons, it extends to all their acts, whether lawful or not (*u*).

Covenant for further assurance—what acts not comprised in.

The ordinary covenant to do all "reasonable" acts for further assurance, or all such acts, &c., as the purchaser shall reasonably require, is not broken by a refusal to do an unnecessary act (*x*); or by a refusal occasioned by the act of God; *e. g.*, the insanity (*y*), death, or severe illness of the party whose further assurance is required (*z*); or by a refusal to give a bond for quiet enjoyment (*a*) or, according to some authorities, a covenant for production of title deeds (*b*); or, perhaps, to enter into fresh covenants for title (*c*). And a Court of Equity has refused, in a suit for the specific performance of the covenant for further assurance, to compel a mortgagor, tenant in tail, to execute a disentailing assurance; there being, in the opinion of the Court, nothing on the face of the deed to show that the parties contemplated the enlargement of the base fee created by the deed into a fee simple absolute (*d*).

(*s*) *Calvert* v. *Sebright*, 16 Beav. 156.

(*t*) *Dudley* v. *Folliott*, 3 Term R. 584.

(*u*) *Nash* v. *Palmer*, 5 M. & S. 374.

(*x*) *Warn* v. *Bickford*, 9 Pri. 43.

(*y*) *Pet and Cally's case*, 1 Leon. 304.

(*z*) See *Nash* v. *Aston*, Sir T. Jones, 195; and *Anon.*, Sir F. Moore, 124, where sickness was held a valid reason for a married woman not levying a fine: and the Court agreed that the case would be the same, "*si la feme soit grosement enseint sic ut ne poit traveller.*"

(*a*) *Staynroyde* v. *Locock*, Cro. Jac. 115.

(*b*) See *Hallett* v. *Middleton*, 1 Russ. 243; Sug. 613; but see *Fain* v. *Ayers*, 2 Sim. & St. 533, 535, *et quære.*

(*c*) *Coles* v. *Kinder*, Cro. Jac. 571, but the point is not clear; see Sug. 614; and 9 Jarm. Conv. by S. 401, n.; *Lassels* v. *Catterton*, 1 Mod. 67.

(*d*) *Davies* v. *Tollemache*, 2 Jur. N. S. 1181; but see the special circumstances of this case.

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What are comprised in.

But such covenant will be broken by a refusal to convey any interest acquired in the estate, even by purchase for valuable consideration (*e*); or to remove a judgment or other incumbrance (*f*): or to execute a duplicate of the conveyance, if the original has been burnt (*g*); or (*semble*) handed over to a sub-purchaser of part of the estate (*h*): but, in such cases, either the conveyance should bear an indorsement expressing that it is a duplicate (*i*), or it should upon the face of it purport to be merely a deed of confirmation.

Time allowed to party required to execute further assurance.

The party called upon to execute the further assurance may claim a reasonable time in which to procure professional assistance (*k*); and according to modern practice, which the Courts would doubtless recognise, a draft of the proposed assurance is furnished to him, that he may submit it to his legal advisers (*l*): and his costs ought, in strictness, to be tendered to him along with the assurance (*m*).

Covenants for title, how restricted.

A vendor's covenants for title are, as we have seen, generally limited to the acts of himself, his ancestors, devisors, grantors, or donors (if he have taken the estate otherwise than by purchase for value,) and persons claiming by, through, under or in trust for him or them respectively. It however frequently happens either that some of the covenants are general and others limited, or that the limited covenants are not consistent in their restrictions: in such cases, questions arise as to how far the restrictions in one covenant affect another.

Only by clearly

A covenant, general in terms, will be so construed, unless

(*e*) *Taylor* v. *Debar*, 1 Ch. C. 274; 2 Ch. C. 212; *Otter* v. *Lord Vaux*, 2 K. & J. 650; 6 De G. M. & G. 638; but see *Davies* v. *Tollemache*, 2 Jur. N. S. 1181, a case of mortgage.

(*f*) *King* v. *Jones*, 3 Taunt. 418, 427.

(*g*) *Bennett* v. *Ingoldsby*, Finch. 902; Sug. 438, 613.

(*h*) *Napper* v. *Lord Allington*, 1 Eq. Ca. Ab. 166.

(*i*) *Ibid.*

(*k*) *Bennet's case*, Cro. El. 9.

(*l*) See Sug. 614.

(*m*) *Heron* v. *Treyne*, Lord Raym. 750.

a contrary intention clearly appear (n); this, however may be evidenced by any part of the instrument (o).

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expressed intention.

Covenants for title, how classified.

Before considering the effect of restrictive words in the covenants themselves, we may remark, that the five usual covenants may be divided into three classes, having distinct objects; *viz.*, first, the covenants for seisin and right to convey, which are strictly covenants for title; secondly, the covenants for quiet enjoyment, and *that* free from incumbrances (not a covenant that the estate *is free* from incumbrances, but merely that there shall be no disturbance by incumbrancers); and thirdly, the covenant for further assurance: and that the first class may be broken without there being any breach of the second or third; for the purchaser, although not acquiring a marketable title, may be undisturbed in the possession, and may never require any further assurance, or may obtain what he does require: also that, if either of the second class be broken (unless the covenant be so worded as to extend to wrongful disturbances), there must have been a breach of the first class: and lastly, that the covenant for further assurance may be broken without there being any breach of any of the other covenants.

Restrictive words, effect of; Lord St. Leonards' propositions respecting:

Upon this subject the four following propositions are laid down by Lord St. Leonards: *viz.*, first that "where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct" (p): secondly, that "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent" (q); thirdly, that "as on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding

(n) See Sug. 605; *Cooke* v. *Founds*, 1 Lev. 40; *Barton* v. *Fitzgerald*, 15 East, 530, 541.

(o) See 2 Bos. & P. 22, 25; *Brown* v. *Brown*, 1 Lev. 57; and see *Delmer* v. *McCabe*, 14 Ir. Com. Law Rep. 377.

(p) Sug. 605.

(q) Sug. 607.

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general covenant will not enlarge a subsequent limited covenant" (r); and fourthly, that "where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others" (s).

how far maintainable.

Of the above propositions, the first, if read in connection with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities (t). The second proposition (which together, or rather as connected, with the first, has been disputed (u),) is, perhaps, hardly accurate; for, although a prior general covenant will not, it appears, be restrained by a subsequent limited covenant having a different object (x), yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first (y). The third and fourth propositions seem to be unimpeachable.

Grammatical construction generally determines connection of covenants.

And, of course, restrictive words occurring in one covenant may extend to another, if the grammatical connection of the two require, and no inconsistency would result from, such a construction (z): "and the Court will endeavour to

(r) Sug. 608.

(s) Sug. 609; see *Crayford* v. *Crayford*, Cro. Car. 106; *Hughes* v. *Bennett*, *ibid.* 495, where the covenants were for seisin notwithstanding any act, &c., and that the lands were of a stated value; *contrà*, where the covenants were that the lands were of a stated value, and should so continue, notwithstanding any act, &c., *Lady Rich* v. *Lord Rich*, Cro. El. 43; *Young* v. *Raincock*, 7 C. B. 310; *Crossfield* v. *Morrison*, 7 C. B. 286.

(t) See *Nervin* v. *Munns*, 3 Lev. 46; *Browning* v. *Wright*, 2 Bos. & P. 13; *Foord* v. *Wilson*, 2 J. B. Moore, 592; as controlled by *Howell* v. *Richards*, 11 East, 633; *Stannard* v. *Forbes*, 6 Ad. & E. 572.

(u) See Jarm. C. by S., vol. ix. p. 383.

(x) *Barton* v. *Fitzgerald*, 15 East, 530; *Gainsford* v. *Griffith*, 1 Saund. 58; *Smith* v. *Compton*, 3 B. & Ad. 189.

(y) See *Nind* v. *Marshall*, 1 Bro. & B. 319; 3 J. B. Moore, 703, 717; but not necessarily, see *Hesse* v. *Stevenson*, 3 Bos. & P. 565; *Saward* v. *Anstey*, 10 J. B. Moore, 55; see also *Martyn* v. *M'Namara*, 4 Dru. & W. 411, where Sugden, C., appears to have considered that a general covenant with A. might be cut down by restrictive words in a covenant entered into upon the same subject-matter with B. upon the same instrument.

(z) *Broughton* v. *Conway*, Dy. 240; *Peles* v. *Jervies*, Dy. 240, n.; and see 6 Ad. & E. 587; *Lady Rich* v. *Lord Rich*, Cro. Eliz. 43.

ascertain the intention of the parties from an attentive consideration of the whole deed, or construe the covenants either as independent or as restrictive of each other, according to such apparent intention" (*a*): and Equity will relieve against general covenants entered into contrary to the intention of the parties (*b*).

Whether real or personal representative of covenantee may sue for breach.

Upon the death of a covenantee, or other person entitled to the benefit of covenants for title which run with the land, and have been broken in his lifetime, the right of action, so far as any actual damage has been sustained by him, belongs to his executors or administrators (*c*); but, except to the extent of such actual damage, the right to sue descends with the land, if freehold or copyhold, to the heir or devisee (*d*); or, if leasehold, to the executors or administrators; or, (if specifically bequeathed,) to the legatee (after the assent of the personal representative to the bequest).

Customary heir may sue before admittance, *semble*.

The customary heir of a copyholder in fee might, it is conceived, sue upon the covenants before admittance: "being a complete tenant against all persons but the lord" (*e*): but this probably would not be so where the admittance is in terms merely for the life of the tenant, with a mere customary right of renewal in the heir (*f*).

Damages, what amount recoverable where no eviction.

Where the title is defective, and an action is brought upon the covenants before eviction, there seems to be no general rule by which the amount of damages should be determined. Where the purchaser has acquired an indefeasible estate, but of a less extent than that which he contracted for, the amount, (if he choose to retain the estate,)

(*a*) 1 Saund. R. n. p. 60.

(*b*) *Coldcot* v. *Hill*, 1 Ch. Ca. 15; *Fielder* v. *Studley*, Rep. t. Finch, 90, cited by Lord Eldon, 2 Bos. & P. 26; and by Lord Alvanley, 3 Bos. & P. 575.

(*c*) *Lucy* v. *Levington*, 2 Lev. 26.

(*d*) *Kingdon* v. *Nottle*, 1 M. & S. 355; *S. C.*, 4 M. & S. 53; *King* v. *Jones*, 5 Taunt. 418; *Jones* v. *King*, 4 M. & S. 188.

(*e*) Scriv. on Cop. 290.

(*f*) See *Doe* v. *Thompson*, 13 Q. B. 670.

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would seem to be, the difference between the estimated values of the two estates; as if, for instance, the land prove to be copyhold instead of freehold (*g*). Lord St. Leonards seems to consider (*h*) that where the title is defective within the covenant, the purchaser, before eviction, may offer to re-convey the estate and claim the entire purchase-money; but no authority is cited for this proposition, which appears to be untenable; the extent of the damnification being the difference between that which the covenantee has and that which he ought to have: but possibly such an action might lie, if the alleged breach consisted in a refusal by the defendant to perfect the title (*i*).

Where a reversionary lease was granted to a lessee in possession by a tenant for life who had no power to make such a demise, the lessee was held entitled, under the covenant for quiet enjoyment, to recover, not merely the premium paid and the costs of the void lease, but also the difference between the value of the lease which was professed to be granted, and that of a lease which he actually obtained from the reversioners for a shorter term and at an increased rent (*k*).

What amount of, recoverable where there is eviction.

Where there has been actual eviction, the purchaser may, under the name of damages, recover interest or mesne profits for the time during which he has been out of possession (*l*). Upon the same principle, he would be entitled to interest upon any charge on the estate which he has been compelled to satisfy: it seems, however, to be doubtful whether he could recover it for such period as he had, without reasonable excuse, neglected to sue upon the covenant (*m*).

(*g*) *Gray* v. *Briscoe*, Noy, 142; see *Wace* v. *Bickerton*, 3 De G. & S. 751.

(*h*) Sug. 611.

(*i*) See 5 Taunt. 428.

(*k*) *Lock* v. *Furze*, L. R. 1 C. P. 441; in the Exch. Ch., affirming a decision of the C. P., 6 New Rep. 340; and see comments in judgment on *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Hopkins* v. *Grazebrook*, 6 B. & C. 31; *Sikes* v. *Wild*, 4 B. & S. 421; and see now *Bain* v. *Fothergill*, L. R. 7 E. & Ir. Ap. 158, affirming L. R. 6 Exch. 59, and restoring the rule as to damages as laid down in *Flureau* v. *Thornhill*. And see further on this subject *infrà* Ch. XVII, sect. 1.

(*l*) *King* v. *Jones*, 5 Taunt. 418; see 422.

(*m*) See *Anderton and another* v. *Arrowsmith*, 2 P. & D. 408.

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Moneys paid by way of compromise, and costs, when recoverable.

So if he, without communicating with the vendor, compromise an adverse claim or suit, he may recover the amount paid by him, and his costs of suit as between attorney and client, subject only to the right of the vendor to show, either that the claim was wholly, or in part, unfounded, or that better terms might have been procured (*n*); and it would appear that, if the vendor, upon notice given to him of a suit within the terms of his covenant for quiet enjoyment, refuse to defend it, he could not, as against the purchaser, dispute the validity of the claim (*o*): it does not, however, appear, that the latter could safely defend an action without giving notice to the vendor or the party liable upon his covenants (*p*), and obtaining his directions, if the defence is apparently hopeless (*q*); and if he disregards the notice, and the purchaser, acting on his own judgment, defends the action and has to pay damages and costs, the latter has been held entitled to recover in an action on the covenant the amount so paid, and also the expenses which he had himself incurred in defending the action (*r*).

Whether the value of improvements.

It has been considered doubtful whether, in any case, the purchaser could recover the expenses of improvements, although stated as special damages in his declaration (*s*): but a difference has been taken between improvements, consisting in additions to the property,—*e.g.*, expensive buildings erected upon the land,—and mere improvements of the land itself (*t*). A distinction may also, it is conceived, be made between the amount recoverable in an action on the covenants for seisin or right to convey—which in their terms refer merely to things as existing at the date of the

(*n*) *Smith* v. *Compton*, 3 B. & Ad. 189, and 407.

(*o*) See *Duffield* v. *Scott*, 3 T. R. 377.

(*p*) See 3 B. & Ad. 408; *Lewis* v. *Peake*, 7 Taunt. 153; and see *Smith* v. *Howell*, 6 Exch. 730.

(*q*) See *Gillett* v. *Rippon*, 1 Mood. & M. 406; *Short* v. *Kalloway*, 11 Ad. & E. 28.

(*r*) *Rolph* v. *Crouch*, L. R. 3 Exch. 44; and see cases there cited.

(*s*) *Lewis* v. *Campbell*, 3 J. B. Moore, 35; 8 Taunt. 715.

(*t*) See 3 J. B. Moore, 52, 54, 57; and see *Bunny* v. *Hopkinson*, *infra*; and Ch. XVII.

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conveyance, and if broken at all are broken immediately—and the amount recoverable in an action on the covenant for quiet enjoyment, which is, in its very terms, prospective: in the latter case, it seems difficult to understand why the full value of the property as existing at the time of the breach of covenant should not be recoverable; especially when (*u*) the property has been professedly bought for the purpose of being improved by building on or otherwise. In one case, it was laid down that the measure of damages in the event of eviction includes the amount expended in converting the land to the purpose for which it was bought; and that the purchaser may recover, not merely the value of the land, but also the amount spent in the erection of houses subsequent to his conveyance (*x*).

As to restricting the liability of tenants in common, &c., upon covenants for title.

It is not an unfrequent practice on a sale by tenants in common, or other persons having partial interests in the estate, to restrict their liability under the covenants for title, not to their respective interests in the estate, which is a proper restriction, but to the amount of their respective shares of the purchase-money. This practice, however, is scarcely defensible; and seems to be founded on the notion that the measure of damages, in case of eviction, cannot exceed the amount of the purchase-money: a notion which is erroneous in cases where there has been an expenditure in improvements of the property.

Bankruptcy and certificate were no defence to action.

Bankruptcy and a certificate were, under the old law, no defence to an action for breach of covenants for title, happening before the bankruptcy; the demand not being a liquidated debt (*y*). But, by the 153rd section of the Act of

(*u*) See *Hadley* v. *Baxendale*, 2 Exch. 341, 354; and see *Hochster* v. *De Latour*, 22 L. J. Q. B. 455; *Walker* v. *Broadhurst*, 21 L. T. 68; *Fletcher* v. *Tayleur*, 17 C. B. 21; *Cory* v. *Thames Shipbuilding Company*, L. R. 3 Q. B. 181.

(*x*) *Bunny* v. *Hopkinson*, 6 Jur. N. S. 187; 27 Beav. 565; and see and consider *Duckworth* v. *Ewart*, 10 Jur. N. S. 214; and the judgment of Blackburn, J.

(*y*) *Hammond* v. *Toulmin*, 7 T. R. 612; and see *Mills* v. *Auriol*, 1 H. Bl. 433.

1861 (z), if any bankrupt was at the time of adjudication liable, by reason of any contract, to a demand in the nature of unliquidated damages, the Court of Bankruptcy had power to assess the damages; and, when assessed, they were provable as if a debt due at the time of bankruptcy: but this section only applied where the contract had been broken before the date of the adjudication, or the act of bankruptcy (a). Where a bankrupt, prior to his bankruptcy, fraudulently professed to sell, as free from incumbrances, an estate which he had already mortgaged, the covenantee was allowed to prove in the bankruptcy for the amount of the principal and interest which he had paid to the incumbrancer, and also for the costs incurred in defending a suit for foreclosure (b).

Trustee under late Bankruptcy Act may disclaim.

Under the Act of 1869, the trustee of the bankrupt's property may, within a limited period, by writing under his hand, disclaim any such property, where it consists of any land burdened with onerous covenants, or where it is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, as respects leaseholds, such disclaimer cannot be made without leave of the Court (c); and any person injured by such disclaimer is to be deemed a creditor of the bankrupt to the extent of such injury, and is entitled to prove the same as a debt under the bankruptcy (d). The Act does not specify how the damages are to be assessed; but, it is conceived, the provisions of the 153rd section of the Act of 1861 will still apply.

Mortgagee cannot release covenants as against mortgagor.

A mortgagee cannot, in Equity, without the consent of the mortgagor, release covenants for title entered into by the vendor from whom the mortgagor purchased (e).

(z) 24 & 25 Vict. c. 134; and compare 12 & 13 Vict. c. 106, s. 178.

(a) *Ex parte Mendel*, 1 De G. Jo. & S. 330.

(b) *Ex parte Elmes*, 12 W. R. 779; see too, *Re Frankau*, 5 L. T. N. S. 697; *Re Barnard*, *ibid.* 806; breaches of covenant to repair.

(c) *Vide suprà*, p. 84, and see *Re Wilson*, L. R. 13 Eq. 186; *Ex parte Lovering*, L. R. 9 Ch. Ap. 586.

(d) 32 & 33 Vict. c. 71, ss. 23, 24.

(e) *Thornton* v. *Court*, 3 De G. M. & G. 293.

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Formerly no action of covenant against devisee.

If the covenantor died before the 16th July, 1830, no action for a breach of covenants for title, or of any other covenant, would lie against his devisee (*f*); whether the breach occurred before (*g*) or after the decease: but if the covenant had been for payment of a sum by way of liquidated damages, and "heirs" were named in the covenant, the devisee would have been liable, jointly with the heir, in an action of debt, in respect of a breach occurring in the lifetime of the covenantor (*h*); although, if there were no heir, no action would have lain against the devisee alone (*i*). The heir, if named in the covenant, is liable to the amount of descended assets, whether the breach occur before or after the death of the covenantor (*k*).

Alteration effected by 1 Will. IV. c. 47.

And under the 1 Will. IV. c. 47 (*l*), devisees are, to the extent of the devised assets, rendered liable to be sued upon the covenants of their testators, jointly with the heir taking assets by descent, or solely if there be no such heir.

Damages for breach of covenant, when claimable as debt in administration suit.

And it has been held in a modern case (*m*), that damages upon covenants for title, in which the heir was named, for breaches happening after the covenantor's decease, will, even as against the devisee, be considered as within the meaning of a testamentary charge of *debts*: and it seems that a claimant for unliquidated damages in respect of a breach of covenant may himself institute a suit for the administration of the covenantor's estate (*n*); but the devisee, or (it is conceived) the heir, in an administration suit, is not bound by the result of proceedings by the covenantee against the personal representatives of the covenantor; but may have the question determined in an action to which he is himself a

(*f*) *Wilson* v. *Knubley*, 7 East, 128; and see *Dilkes* v. *Broadmead*, 6 Jur. N. S. 289; affirmed 7 Jur. N. S. 56.

(*g*) *S. C.*

(*h*) See *Jenkins* v. *Briant*, 6 Sim. 603, 607; *Coope* v. *Cresswell*, L. R. 2 Ch. p. 112.

(*i*) *Hunting* v. *Sheldrake*, 9 M. & W. 256.

(*k*) See Shep. Touch. 177.

(*l*) See ss. 2, 3, 4, & 8. The Act came into operation on the 16th July, 1830.

(*m*) *Morse* v. *Tucker*, 5 Ha. 79; *Bermingham* v. *Burke*, 2 J. & L. 699.

(*n*) *Burch* v. *Coney*, 14 L. T. 414; 14 Jur. 1009.

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party (o): nor can interest be claimed prior to the amount of damages being so determined: but where devisees, having insisted on this right, were unsuccessful in the action, the covenantee was allowed the amount of the damages assessed upon the trial, his costs of defending the ejectment upon which he had been evicted, and of an action brought by him against the personal representatives of the covenantor, and by the result of which the devisees had refused to be bound, of the action to which the devisees were parties, and of the suit in Equity, and also interest on the damages and costs, to be computed from the time when the amount was ascertained and judgment entered up in the action against the devisees (p).

No apportionment of damages in favour of remainderman.

A remainderman has no equitable claim upon damages recovered by the tenant for life upon breach of covenants for title (q); as he himself can bring an action for the injury (if any) sustained by him as owner of the reversion.

Covenants relieved against in Equity.

A vendor selling, at a great undervalue, an estate with a title which proved bad, has been relieved in Equity against an action on the covenants for title, upon the terms of his refunding the price and interest and being charged with the mesne profits (r); but the contract is described as a "catching bargain" on the part of the purchaser; and it is conceived that no such relief would be afforded where the lowness of price could be referred to the known state of the title.

Conveyance set aside for fraud,—on what terms as against innocent sub-purchaser.

Where a bill was filed to set aside a conveyance as fraudulent, and the defendant, *pendente lite*, sold parts of the estate to parties who had no notice of the fraud, and died, and a supplemental bill was filed against his representatives and the purchasers; the latter, being evicted, were held entitled in the suit to repayment of the purchase-money by his

(o) *Morse* v. *Tucker*, *ubi suprà:* and see *Cox* v. *King*, 9 Beav. 530; *Norman* v. *Stiby*, 9 Beav. 560.

(p) 5 Ha. 79.

(q) *Noble* v. *Cass*, 2 Sim. 343.

(r) *Zouch* v. *Swaine*, 1 Vern. 320.

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representatives; and, as against the plaintiff, to an allowance for lasting repairs and substantial improvements (s).

Purchaser's remedies on vendor's covenants other than for title.

The rights arising under a vendor's covenants (other than covenants for title), appear to be subject to the same rules as have been already considered with reference to a purchaser's covenants (t).

Need not execute conveyance before suing.

Lastly, we may here remark that, where the conveyance contains covenants by the purchaser, his non-execution of the deed would not, at Law, be any defence to an action by him for breach of the vendor's covenants (u).

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Purchaser's remedy, &c., in respect of defects.

(6.) *Purchaser's remedy under special circumstances, in respect of defects* (x).

Purchaser accepting defective title through fraud of vendor, relieved in Equity.

A purchaser, after conveyance and payment of his purchase-money, may obtain relief in Equity against a vendor, who, by fraudulent misrepresentation, has induced him to accept a defective title (y); nor need he wait until eviction, but may, at once, claim to have the contract rescinded (z); and he should be prompt in applying to the Court (a). In a modern case in the House of Lords (b), it was laid down that in order to entitle the purchaser to relief, the misrepresentation must be of an existing fact, and not of a mere intention. This doctrine was strongly disapproved by Lord

(s) *Trevelyan* v. *White*, 1 Beav. 588.

(t) *Vide suprà*, sect. 4, and authorities cited; and see *Brewster* v. *Kitchen* or *Kidgil*, Ld. Raym. 317, 322, and 5 Mod. 369; and *Holmes* v. *Buckley*, 1 Eq. Ca. Abr. 27; and the remarks on these decisions in Smith L. C. vol. i. 32, *et seq.*

(u) See *Morgan* v. *Pike*, 14 C. B. 473; *Northampton G. L. C.* v. *Parnell*, 15 C. B. 630.

(x) *Vide suprà*, p. 103.

(y) *Edwards* v. *M'Leay*, G. Coop. 308, 312; 2 Sw. 287; *Berry* v. *Armistead*, 2 Ke. 221; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Roddy* v. *Williams*, 3 J. & L. 1; see *Jillard* v. *Edgar*, 3 De G. & S. 507: *Money* v. *Jorden*, 2 De G. M. & G. 318, and 15 Beav. 372: reversed, 23 L. J. Ch.; 5 H. L. Ca. 185; *Hutton* v. *Rosseter*, 7 De G. M. & G. 9.

(z) G. Coop. 318; 2 Ke. 221.

(a) *Suprà*, p. 48; 3 & 4 Will. IV. c. 27, s. 24; and see *Jennings* v. *Broughton*, 5 De G. M. & G. 126.

(b) *Jorden* v. *Money*, 5 H. L. Ca. 185.

St. Leonards (c): nor is it easy to see why the declaration of an intention to do or abstain from doing some act, which has the effect of inducing a purchaser to complete, (as, *e. g.*, where a vendor states his intention not to enforce a charge which he has upon the property,) should not, in Equity, be equally binding upon the party making it, as the misrepresentation of an actual existing fact (as, *e. g.*, where a vendor untruly alleges that he has no charge upon the estate). In one case (d), where A., a lessee, pending negotiations for an underlease to B., stated that the sea-view from the property could not be interfered with, inasmuch as he was restrained by the covenants of his lease from building on the land where alone an obstruction could be caused, and the underlease was accepted and the property dealt with, on the faith of this representation, A., having surrendered his old lease and obtained a fresh lease,—without the restrictive covenants,—was, on a bill filed by B., restrained from building so as to obstruct the sea-view.

Contract founded on misrepresentation rescinded *in toto*.

And where a person has been induced to enter into a contract with another by his material misrepresentation, he is entitled not merely to have the misrepresentation made good, but, if he so elect, to have the whole contract avoided (e); and the burden of proving that the misrepresentation was not relied on lies upon the party making it: but the misrepresentation must be material, and not merely conjectural, in order to set aside a purchase (f).

So in case of fraudulent concealment.

Even a fraudulent concealment, by the vendor, of a material fact which the purchaser has no sufficient means of discovering (g), may entitle the purchaser to relief (h).

(c) *Jorden* v. *Money*, 5 H. L. Ca. 248.

(d) *Piggott* v. *Stratton*, Johns. 341; affd. 1 De G. F. & Jo. 33; and see observations in judgment on *Jorden* v. *Money*; *Smith* v. *Kay*, 7 H. L. C. 750.

(e) See *Rawlins* v. *Wickham*, 3 De G. & Jo. 304; and see *Re Nicol*, *ibid.* 387; *Jauncey* v. *Knowles*, 29 L. J. Ch. 95; *Charlesworth* v. *Jennings*, 34 Beav. 96.

(f) *Jennings* v. *Broughton*, 5 De G. M. & G. 126; and see Seton, 651.

(g) See *Conybeare* v. *New Brunswick*, *&c.*, *R. Co.*, 1 De G. F. & Jo. 578; *New Brunswick*, *&c.*, *R. Co.* v. *Muggeridge*, 1 Drew. & S. 363. *Aliter*, if the defect be patent; *suprà*, p. 92; and see *Lowndes* v. *Lane*, 2 Cox, 363.

(h) See G. Coop. 312; *Early* v.

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Thus, in a modern case, where a purchaser in possession was fraudulently induced by the vendor and his solicitor, in the absence of his own professional adviser, to pay the purchase money and execute covenants for the production of title deeds, while the title to part of the property was under investigation with reference to a known defect, he was held entitled to rescind the contract, to recover his purchase-money, with his costs, charges, and expenses, and to have the deeds of covenant delivered up to be cancelled (*i*). So, where a vendor, seemingly from mere mistake, erroneously stated that a will, forming part of the title, had been proved, the purchaser, after conveyance, obtained a decree that the will should be deposited with the Master, and the vendor was fixed with costs (*k*). So, a vendor of an equity of redemption, misrepresenting the amount of incumbrances, will be bound to make good his mis-statement (*l*).

General doctrine as to how far vendor is responsible for his agent.

The general doctrine as to the responsibility of a vendor for the acts of an agent, whom he has either expressly authorized, or, by his conduct, adopted, is well established both at Law and in Equity; but it is extremely difficult to define what sort or degree of misrepresentation on the part of the agent will entitle the purchaser to set aside a purchase which has been completed by conveyance and by payment of the purchase-money. We have already (*m*) referred to this subject in treating of the relative duties of vendors and purchasers before entering into an agreement for sale; and we shall again refer to it more fully in treating of the grounds of defence to a suit for specific performance. The remarks there made are applicable here; with this qualification, viz., that a misrepresentation by the vendor, or his agent, which will avail the purchaser as a defence, may yet not be sufficient to entitle him as plaintiff to have

Garrett, 4 M. & R. 687, 690; and see 2 Y. & C. C. C. 577; and the judgment in *Small* v. *Attwood*, You. 455; and *S. C.*, 6 Cl. & F. 232.

(*i*) *Berry* v. *Armistead*, 2 Ke. 221.

(*k*) *Harrison* v. *Coppard*, 2 Cox, 318.

(*l*) *Att.-Gen.* v. *Cox*, 3 H. L. C. 240.

(*m*) *Suprà*, p. 93.

his money returned after it has been paid and the estate has been conveyed.

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Cases in which the vendor has been held responsible.

In a case, which has often been the subject of comment, where a public way over the estate had been so blocked up, under a mere temporary arrangement, that it could not be discovered by the purchaser, and the vendor's solicitor (the vendor herself having no personal knowledge of its existence,) omitted to disclose the same, or to produce the deed establishing it; but not, as the Court considered, "with any intention to do or sanction anything he thought wrong;" and the conditions of sale required the purchaser to build a wall which in fact interfered with such right of way, it was held, that this was such implied fraud in the vendor as enabled the Court to decree a reconveyance (*n*). The bill, however, which rested the purchaser's case upon the ground of personal fraud, was, on appeal, dismissed by the Lords (*o*); they being of opinion that the vendor had no actual knowledge of the circumstances, and that the agent's knowledge could not sustain a charge of personal fraud against the principal; and that the plaintiff, putting his case on the ground of personal fraud, could not rest it on any other ground: and Lord Cottenham cited, and seemed to approve of, a case (*p*), where a lessor having informed his intended lessee (in answer to an inquiry on the point), that no public right of way existed over the estate, a bill to rescind the executed lease on the ground of the ascertained existence of such right of way, was dismissed, there having been no wilful misrepresentation.

Purchaser must show wilful misrepresentation, *semble*.

It may be remarked of one of the above cases (*q*), that the misrepresentation evidently resulted from mere carelessness in not ascertaining whether certain mark-stones denoted the centre or the side of the way; and, of the other (*r*), that the

(*n*) *Gibson* v. *D'Este*, 2 Y. & C.C.C. 542.

(*o*) *Wilde* v. *Gibson*, 1 H. L. C. 605. See Lord St. Leonards' remarks on the case, in his treatise on the Law of Property: but see also V.-C. Wood's remarks in *Parr* v. *Jewell*, 1 K. & J. 673.

(*p*) *Legge* v. *Croker*, 2 Ba. & B. 506.

(*q*) *Gibson* v. *D'Este*, *ubi suprà*.

(*r*) *Legge* v. *Croker*, *ubi suprà*.

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lessor had grounds for believing his statement to be correct. In each case the misrepresentation, if discovered in time, would probably have been a sufficient reason for refusing to complete the contract. But, as observed by Lord Cottenham (s), there is a marked distinction made by Courts of Equity between what is necessary to resist a suit for specific performance of a contract, and what is necessary to support a suit to set aside a deed executed and an arrangement completed. It seems that, in such cases the principal would, as a general rule, be bound by the fraud of the agent (t); but not by his mere non-communication of his constructive knowledge, or of knowledge acquired by him otherwise than as agent (u).

Principal bound by fraud of agent.

Case of *bonâ fide* misstatement by agent.

Nor, it is conceived, will a misrepresentation of the agent, made *bonâ fide* and in ignorance of the true facts, entitle a purchaser to have his money returned after conveyance: although, as we have already seen (x), the innocent misstatement by an agent upon a material point, *e. g.*, the existence of a nuisance, unknown to himself, but known to his principal—or even, it is conceived, if unknown to the principal—may be a good defence to a suit for specific performance of the contract.

Excessive price no ground for relief.

A purchaser after completion could not, it is conceived, in the absence of fraud, obtain relief on the ground of the price having been unreasonable (y).

Terms on which purchaser is relieved in Equity.

Where a reconveyance is decreed, the purchaser will be credited, in addition to his purchase-money, not only with

(s) *Vigers* v. *Pike*, 8 Cl. & F. 645.

(t) See *Wilson* v. *Fuller*, 3 Q. B. 68, 77; Sug. 248; 1 H. L. C. 615; and see *Cornfoot* v. *Fowke*, 6 Mee. & W. 358; see *suprà*, p. 84; *Conybeare* v. *New Brunswick R. Co.*, 1 De G. F. & Jo. 578; *National Exchange Coy. of Glasgow* v. *Drew*, 2 Macq. 103; *Barry* v. *Croskey*, 2 J. & H. 1. As to corporations, see *Ranger* v. *Gt. Western R. Co.*, 5 H. L. C. 86.

(u) *Wilde* v. *Gibson*, 1 H. L. C. 605; and see *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 6.

(x) *Suprà*, p. 93, and cases there cited.

(y) See *Small* v. *Attwood*, You. 407. 6 Cl. & Fin. 232; *Pike* v. *Vigers*, 2 Dru. & W. 1, 252; *Cockell* v. *Taylor*, 5 Beav. 115.

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necessary outgoings in respect of the estate, but also with the amount of repairs and improvements, if executed before the discovery of the defect in title, and if their repayment is specially prayed by the bill (z): and, probably, of necessary repairs executed during or pending litigation, if specially prayed (a). He will also be allowed his costs of the purchase and conveyance (b), and interest upon all these several sums at the rate of 4*l.* (c) *per cent.* from the times of their respective payments or expenditure; and will be debited with such rents and profits as he has, or without wilful default (d) might have, received; and with an occupation rent in respect of any part of the estate which has been in his own possession (e). He would also, it is conceived, be compelled to reinstate premises which he had materially altered; *e. g.*, a private house converted into a shop (f). Where a purchase was set aside for fraud on the part of the purchaser, and the rents exceeded the interest of the purchase-money, annual rests were directed until the principal should be liquidated (g): but a special case must be shown to warrant such a direction (h)

Allowed to follow purchase-money, *semble.*

In one case the purchaser, obtaining a decree for rescinding a purchase on the ground of fraud, was allowed to follow the stock in which part of the purchase-money had been invested (i); but the decree rescinding a purchase was subsequently reversed; and it became unnecessary to prosecute an appeal to the House of Lords which had been lodged by

(z) See *Edwards* v. *M'Leay*, 2 Sw. 289; and see Seton, p. 645.

(a) See Sug. 254.

(b) 2 Sw. 289. See the decree.

(c) See 2 Y. & C. C. C. 581; 5*l. per cent.* was formerly allowed, see Jac. 166.

(d) See the decrees in *Gibson* v. *D'Este*, 2 Y. & C. C. C. 581; *Wilde* v. *Gibson*, 1 H. L. Ca. 636; and *Murray* v. *Palmer*, 2 Sch. & L. 490; but see, *contrà*, the judgment, *ibid.* 489; and see *Summers* v. *Griffiths*, 35 Beav. 27; *Prees* v. *Coke*, L. R. 6 Ch. Ap. 645, where a direction as to annual rests was on appeal struck out of the decree; Seton 639.

(e) See 2 Y. & C. C. C. 581.

(f) See Jac. 165.

(g) *Donovan* v. *Fricker*, Jac. 165.

(h) See *Neesom* v. *Clarkson*, 4 Ha. 97; *Prees* v. *Coke*, L. R. 6 Ch. Ap. 645, 651.

(i) *Small* v. *Atwood*, You. 507; 6 Cl. & Fin. 232; *Ernest* v. *Croysdill*, 2 De G. F. & Jo. 175; see pp. 188, 197.

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the holders of the stock. Lord St. Leonards remarks that this is the only case in which Equity has, under such circumstances, followed the purchase-money, and that the order, if the appeal had been prosecuted, could hardly have been maintained (k).

Bill for compensation not attainable.

A bill filed, after conveyance, simply for compensation in respect of defects in the estate, will be dismissed (l); although such defects, accompanied by fraudulent misrepresentation or concealment, may be a ground for rescinding the executed contract.

Action on the case.

And a purchaser may, after conveyance, bring an action on the case for a fraudulent misrepresentation of the property (m) or the title; although it be made not directly to the purchaser, but to a person in treaty for the property, and who communicates it to the purchaser (n): or may recover the purchase-money, if the circumstances of the case entitle him rescind the contract (o).

Section 7.

(7.) *As to purchaser's right to pay off incumbrances out of unpaid purchase-money.*

As to purchaser's right to pay off incumbrances, &c.

Whether he can, after con-

After the conveyance has been executed, the purchaser may (p) discharge out of any purchase-money which remains unpaid, (although secured,) any incumbrances which either

(k) Sug. 256.

(l) *Newham* v. *May*, 13 Pri. 749; and see *Leuty* v. *Hillas*, 2 De G. & Jo. 110. The Court has no jurisdiction under Lord Cairns' Act, to give compensation after conveyance.

(m) *Dobell* v. *Stevens*, 3 B. & C. 623; *Mummery* v. *Paul*, 1 C. B. 316; *Gerhard* v. *Bates*, 2 El. & B. 476; *Fuller* v. *Wilson*, 3 Q. B. 58, 68; although made by an agent, *S. C.*: but see, *contrà*, Lord Campbell's dictum, 1 H. L. C. 615, as to the distinction, in this respect, between actions on the contract and on the case.

(n) *Pilmore* v. *Hood*, 5 Bing. N. C. 97; and see *Langridge* v. *Levy*, 2 M. & W. 519, 532.

(o) *Early* v. *Garrett*, 4 Man. & R. 687.

(p) See *Serjeant Maynard's case*, Freem. Ch. R. 1; *Anon.*, *ib.* 107. A payment made by the purchaser to an incumbrancer on the estate is *primâ facie* in discharge of the incumbrance, although the latter may have other claims on the purchaser; *Brett* v. *Marsh*, 1 Vern. 468; *Heyward* v. *Lomax*, *ibid.* 24; *Smith* v. *Smith*, 9 Beav. 80; *Peters* v. *Anderton*, 5 Taunt. 596.

have been created by the vendor himself, or are covered by his covenants for title (*q*): but not incumbrances paramount to his title, and not covered by his covenants (*r*): and this right, it is conceived, would not, where security has been given for the purchase-money, prevail, as against an assignee for valuable consideration and without notice, and who, previously to taking the assignment, had ascertained from the purchaser the existence of the debt; otherwise, no one could safely take a transfer of a mortgage by a purchaser to a vendor for securing part of the purchase-money. The case seems to be within the principle of one where it was decided that, where a tenant for life with power of sale had sold an estate, and covenanted that it was free from incumbrances, and the money had been paid to the trustees of the settlement and invested, the purchaser, on discovering the existence of incumbrances, had no claim upon the vendor's life-interest in the money as against an annuitant, to whom, for valuable consideration, and without notice of the fraud committed by the vendor, the trustees of the stock had, at the vendor's request, given an irrevocable power of attorney to receive the dividends (*s*): and Lord Thurlow, on appeal, intimated an opinion, (which however, was extra-judicial,) that (irrespectively of the claim of the annuitant) the purchaser could not have followed the money when deposited with the trustees. The case is cited by Lord St. Leonards as an authority for the proposition that, notwithstanding incumbrances have been fraudulently concealed, "the purchaser has no lien on the purchase-money after it is appropriated by the vendor" (*t*).

veyance, retain incumbrances out of unpaid purchase-money.

But where the same solicitor, acting for both parties, had received the purchase-money, with, as alleged, by the purchaser, the knowledge of an incumbrance, the Court held that he had so received it as agent of the vendor, and the

Out of purchase-money paid to solicitor as common agent.

(*q*) Sug. V. & P. 518; *Tourville* v. *Nash*, 3 P. W. 306.

(*r*) *Thomas* v. *Powell*, 2 Cox, 394; *Vane* v. *Lord Barnard*, Gilb. E. R. 6.

(*s*) *Cator* v. *Lord Pembroke*, 1 Bro. C. C. 301; 2 Bro. C. C. 282.

(*t*) Sug. 553.

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purchaser's petition to have it applied in discharge of the incumbrance was dismissed with costs (*u*).

Purchaser buying up incumbrances.

A purchaser buying up incumbrances which the vendor is bound to satisfy, can charge, as against the latter, only the price actually paid for them (*x*).

Section 8.

Purchaser's remedy in Equity, &c.

(8) *Purchaser's remedy in Equity if he buy his own estate—or if lands are omitted from conveyance—and as to further assurance in Equity and by Statute.*

Purchaser buying his own estate relieved in Equity.

If it appear that the estate belonged to the purchaser, he can, in Equity, and probably at Law (*y*), recover his purchase-money; although he might have discovered his right from the abstract of title (*z*); nor is it clear that the absence of fraud in the vendor will bar the relief (*a*).

Whether so if he buy estate which has no existence:

And it has been held (*b*), that a purchaser who, although without any fault on the part of the vendor, buys an estate which in fact has no existence, (*e.g.*, a remainder expectant on an estate tail which has been barred,) can obtain relief in Equity. The principle has been doubted by Lord St. Leonards (*c*): but it has been decided that, even at Law, an action lies in such a case to recover the purchase-money as money paid without consideration:—as where a life annuity is sold after the death of the *cestui que vie* (*d*).

or known to the vendor to be utterly worthless.

In a late case, where a creditor of an insolvent firm, one

(*u*) *Tylee* v. *Webb*, 14 Beav. 14.

(*x*) *Cane* v. *Lord Allen*, 2 Dow. 289, 296.

(*y*) See *Strickland* v. *Turner*, 7 Exch. 208.

(*z*) *Bingham* v. *Bingham*, 1 Ves. 126; *Cochrane* v. *Willis*, L. R. 1 Ch. App. 58; and see, as to cases of compromise of doubtful rights, *Lansdown* v. *Lansdown*, Mos. 364; *Leonard* v. *Leonard*, 2 Ba. & B. 171; *Stewart* v. *Stewart*, 6 Cl. & F. 911.

(*a*) *Bingham* v. *Bingham*, *ubi suprà*.

(*b*) *Hitchcock* v. *Giddings*, 4 Pr. 135; *Ridgway* v. *Sneyd*, Kay, 635; and see *Stent* v. *Bailis*, 2 P. Wms. 217, 220; the judgment in which contains evidently bad law; and see *Clare* v. *Lamb*, L. R. 10 C. P. 334.

(*c*) See Sug. 247.

(*d*) *Strickland* v. *Turner*, 7 Exch. 208; *Barr* v. *Gibson*, 3 M. & W. 399; *Hastie* v. *Couturier*, 9 Exch. 102; *Gompertz* v. *Bartlett*, 2 El. & B. 849; *Chapman* v. *Speller*, 14 Q. B. 621.

of the members of which was also separately insolvent and *non compos*, in order to procure a title to the separate interest of the *non compos* partner, issued an execution against him, and sold by the sheriff, with the intention of himself purchasing, so as to facilitate dealings with the partnership estate, but it was knocked down to a stranger, the purchaser was relieved from his purchase, with costs against the vendor; on the ground that the property was utterly worthless, within the vendor's knowledge; and that the execution and sale were entirely under his control (*e*).

Purchaser may claim in Equity lands shown to him or accidentally omitted.

If lands shown to a purchaser are excepted in the conveyance under a name by which he did not know them, he can claim them in Equity; and by getting in an outstanding legal estate may hold them, even as against a subsequent purchaser for valuable consideration and without notice (*f*); and he could, doubtless, enforce a conveyance of them, as against the vendor, or volunteers. He has also, it would appear, the same rights as respects lands accidentally omitted from the conveyance, if shown to him as part of his purchase (*g*), or if he can prove an agreement for their purchase sufficient within the Statute of Frauds (*h*). And, as a general rule, where the conveyance is executed for the purpose of giving effect to and executing the agreement, and by fraud, accident, or mistake, it gives to the purchaser less than he is entitled to under the agreement, he may call upon the Court to rectify the defective conveyance, and give him all that the agreement comprehended (*i*): but not where the omitted property has in the meantime been conveyed to another purchaser without notice; and in such a case, unless there be actual fraud, it would seem that no compensation can be given (*k*).

(*e*) *Smith* v. *Harrison*, 3 Jur. N. S. 287; 26 L. J. N. S. 412.

(*f*) *Oxwick* v. *Brockett*, 1 Eq. C. Ab. 355.

(*g*) See *Cass* v. *Waterhouse*, Prec. Ch. 29.

(*h*) *S. C.*, and see *Nelson* v. *Nelson*, Nels. Ch. R. 7 (which, however, was a case between principal and agent); and *Calverley* v. *Williams*, 1 Ves. J. 210.

(*i*) *Vide suprà*, sect. 2.

(*k*) *Leuty* v. *Hillas*, 6 W. R. 51; reversed, *ib.* 217: 2 De G. & Jo.

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When relief afforded.

And relief upon a defective instrument is the more readily afforded when the party to be charged thereon is himself the person who prepared or perfected it (*l*). But where the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the latter may be the best evidence of the terms of the actual agreement (*m*). If the purchaser's bill in such a case is dismissed, and the purchase-money has been paid by him into Court, and not invested, he must pay interest upon it to the vendor, although it has been unproductive (*n*). Of course, the Court will not interfere if the agreement was, in the technical sense of the word, inequitable (*o*).

May require vendor to convey subsequently acquired interests.

So, also, the purchaser may in Equity, under the covenant for further assurance, although not running with the land (*p*), require the vendor to perfect a defective title: even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration (*q*): and the right seems to exist independently of such a covenant (*r*): and may be enforced against the vendor's representatives, and parties claiming under him for valuable consideration with notice (*s*): and the rule seems to be the same even when he has no estate in the land at the date of the conveyance. It was, however, decided in an old case (*t*), that such an equity could not be enforced against the heir: but there seems to be no good ground for such a distinction, and it has been

110, upon the ground that the particulars did not warrant the purchaser's belief. This case does not seem to fall within Lord Cairns' Act.

(*l*) See *Ex parte Wright*, 19 Ves. 257; *Collett* v. *Morrison*, 9 Ha. 176. In some parts of the West of England, there is a pernicious practice of stipulating that the vendor or his solicitor shall prepare the purchaser's conveyance.

(*m*) Per V.-C. Wigram, *Humphries* v. *Horne*, 3 Ha. 277, 278.

(*n*) *S. C.*

(*o*) *Johnson* v. *Nott*, 1 Vern. 271.

(*p*) See *Spencer* v. *Boyes*, 4 Ves. 370.

(*q*) *Taylor* v. *Debar*, 1 Ch. C. 274; 2 Ch. C. 212; *Otter* v. *Lord Vaux*, 1 K. & J. 650; 6 De G. M. & G. 638.

(*r*) See *Noel* v. *Bewley*, 3 Sim. 116; *Seabourne* v. *Powel*, 2 Vern. 11.

(*s*) *Jennings* v. *Blincorne*, 2 Vern. 609.

(*t*) *Morse* v. *Faulkner*, 1 Anst. 11.

judicially disapproved of by Lord St. Leonards (*u*). So, the assignees of a bankrupt tenant in tail, who has professedly aliened the fee simple, have been required to bar the entail (*x*).

Where a man conveyed his contingent remainder in fee by way of mortgage, and covenanted for further assurance; and the remainder was afterwards destroyed by his mother, the tenant for life, (who was also the reversioner in fee,) he was held liable in Equity to perfect the security out of an interest in the estate which he took under her will (*y*). So, where a man who was supposed to have a reversion in fee, but in fact had no estate in the land, executed what purported to be a conveyance of the same for valuable consideration, he was held liable, under his covenant for further assurance, to convey the estate on its subsequently coming to him as heir at law (*z*). The cases seem, as observed by Lord St. Leonards, C. (*a*), "to establish this, that if a man sells an estate, and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title:" but, in applying this rule, the word *estate* must be strictly construed; for evidently no such equity could exist where the contract had been for the purchase of a professedly contingent interest at a price fixed with a view to the contingency. And in one case, where a tenant in tail in remainder, by an unenrolled deed, mortgaged the land, for his life "and all other his estate and interest" therein, and entered into the usual covenant for further assurance, it was held that this did not bind him subsequently to execute a disentailing assurance. But the Court admitted that such right would have existed if the tenant in tail had professed to convey the fee (*b*).

(*u*) See 1 Dru. & W. 159.

(*x*) *Pye* v. *Daubuz*, 3 Bro. C. C. 595; *Ex parte Fripp*, 1 De G. 293; (in each case there was a covenant for further assurance) and see judgment in *Davies* v. *Tollemache*, *infrà*.

(*y*) *Noel* v. *Bewley*, 3 Sim. 103.

(*z*) *Smith* v. *Baker*, 1 Y. & C. C. C. 223.

(*a*) See *Jones* v. *Kearney*, 1 Dru. & W. 159.

(*b*) *Davies* v. *Tollemache*, 2 Jur. N. S. 1181; see and consider judgment, and Sug. 468.

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But a purchaser cannot claim the *subsequently acquired* interest of a person who is present at and assents to the purchase, but is no party to the conveyance (*c*) or contract.

Although the sale were of a mere expectancy, *semble*.

It seems probable that the purchaser could come into Equity for further assurance, even in the case of a conveyance by a mere expectant heir professedly selling the estate in the lifetime of his ancestor (*d*).

But cannot require further evidence.

A purchaser cannot, it would seem, file a bill to enforce the production of evidences of title which at the time of completion he treated as unimportant (*e*).

No estoppel by doubtful recital.

A conveyance by lease and release, containing no precise recital of the vendor's seisin, but only a recital that he is "legally or equitably entitled to the property," cannot operate by way of estoppel so as to pass the after-acquired legal estate (*f*): nor can a recital that the vendor "is seised *or otherwise well and sufficiently entitled* for an estate of inheritance in fee simple in possession free from incumbrances" (*g*): but a particular recital of title, as *e.g.*, that the vendor is seised, has the effect of an estoppel (*h*): unless contradicted by other parts of the same deed (*i*). So, a mortgagor who has attorned tenant to his mortgagee, is estopped from disputing his title, or his right to distrain (*k*);

(*c*) *Thompson* v. *Simpson* 2 J. & L. 110.

(*d*) 1 Fonb. on Eq. b. i. ch. 4, s. 2; *Wethered* v. *Wethered*, 2 Sim. 183; *Harwood* v. *Tooke*, 2 Sim. 192; but see *Carleton* v. *Leighton*, 3 Mer. 667; *Jones* v. *Roe*, 3 T. R. 93. An equitable charge upon an expected legacy was supported in *Bennett* v. *Cooper*, 9 Beav. 252.

(*e*) See *Hallett* v. *Middleton*, 1 Russ. 243, 256.

(*f*) *Right* v. *Bucknell*, 2 B. & Ad. 278; and see Sug. 739, n.; and *Lloyd* v. *Lloyd*, 4 Dru. & W. 354.

(*g*) *Heath* v. *Crealock*, L. R. 10 Ch. Ap. 22, 30.

(*h*) *Bensley* v. *Burdon*, 2 Sim. & St. 519; on appeal, 8 L. J. Ch. 85. This case is said to be overruled by *Right* v. *Bucknell*, see 4 Dru. & W. 369, *sed qu.* See *Carpenter* v. *Buller*, 8 M. & W. 209; *Doe* v. *Stone*, 3 C. B. 176; *Wiles* v. *Woodward*, 20 L. T. 261. Exch.; *Horton* v. *Westminster I. Commissioners*, 7 Exch, 780; *Fawcus* v. *Porter*, 3 Car. & K. 309; and see *Heath* v. *Crealock*, L. R. 10 Ch. Ap., and judgment of Lord Cairns, p. 30.

(*i*) *Crofts* v. *Middleton*, 1 Jur. N. S. 1183, V.-C. W.; 2 K. & J. 194; 8 De G. M. & G. 192.

(*k*) *Jolly* v. *Arbuthnot*, 4 De G. & Jo. 224.

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and this doctrine of estoppel, which depends on the agreement between the parties to create the relation of landlord and tenant, has, at Law, been recently applied to a case where it was apparent on the face of the deed, which was not executed by the mortgagee, that there was no legal reversion to support the right to distrain (*l*).

Voidable estate created by tenant in tail; confirmation of by subsequent assurance.

Where a voidable estate has, either before or after the passing of the 3 & 4 Will. IV. c. 74, been created by a tenant in tail in favour of a purchaser for valuable consideration, any subsequent assurance under the Act, (other than a lease not requiring enrolment,) whatever may be its object or the extent of estate intended to be thereby created, confirms the previous voidable estate to the extent to which the tenant in tail alone, or the tenant in tail with the consent of the protector, (if there be one, and he consent to such subsequent assurance,) could confirm the same under the Act: but this is not to affect any purchaser for valuable consideration, to whom such subsequent assurance may be made, without express notice of the previous voidable estate (*m*). So, before the Act, a fine by a tenant in tail confirmed his previous voidable conveyance (*n*).

Verbal agreement for indemnity enforced.

Equity, it appears, will, after conveyance, enforce a verbal agreement, entered into by a purchaser of leaseholds, before the sale, to indemnify the vendor against the rent and covenants (*o*).

(*l*) *Morton* v. *Woods*, L. R. 3 Q. B. 658; affirmed in the Exchequer Chamber, L. R. 4 Q. B. 293.

(*m*) 3 & 4 Will. IV. c. 74, s. 38; and see, as to bankruptcy of a tenant in tail who has created a voidable estate, sect. 62 of Act; and see, as to confirmation of the voidable estates of purchasers under the bankruptcy of a tenant in tail, sects. 60, 61, and 65 of Act; and 12 & 13 Vict. c. 106, sect. 208; not repealed by the Act of 1861. See *Sturgis* v. *Morse*, 2 De G. F. & Jo. 223. And as to the power of a trustee under the Act of 1869 over the bankrupt's estate tail, see 32 & 33 Vict. c. 71, sect. 25, subsect. 4.

(*n*) *Lloyd* v. *Lloyd*, 4 Dru. & W. 354.

(*o*) *Pember* v. *Mathers*, 1 Bro. C. C. 52. As to the liability, under an implied contract, of each successive assignee of a lease to indemnify the original lessee, notwithstanding an express covenant to indemnify the immediate assignor, see *Moule* v. *Garrett*, L. R. 5 Exch. 132.

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Fire policies —right to.

Poole v. Adams.

In a modern case it was decided that a mortgagee was entitled in Equity to a policy of insurance against fire; although not noticed in the mortgage. Much of the reasoning in the judgment seems to apply equally to a purchase out and out (p). However, in a later case in Equity, it was decided by an eminent judge, that in the absence of any express provision in the contract a purchaser is not entitled to the benefit of an existing insurance against fire; and that if, in the interval between the contract and the conveyance, the buildings are burned down, he must bear the loss (q); although the amount of the assurance has been paid to the vendor. That is to say, that the vendor may, if he can get it, take his purchase-money twice over: once from the insurance office, and again from the purchaser; and Equity, although it will not enforce payment by the purchaser, who gets nothing, will not relieve him from the legal consequences of the contract, and of subsequent events. Had the former case been cited, it may be supposed that the Court would have seen its way to the adoption of the reasonable doctrine; *viz.*, that although, in the absence of stipulation, a vendor is not bound to keep up, or perhaps even to assign, a fire policy, yet that, as regards any money which he may actually receive under it, for damage done to the inheritance subsequently to the date of the contract, he holds such money upon an implied trust to make good the damage. It is obvious that no honest man could, for his own benefit, act in accordance with the decision in *Poole* v. *Adams*.

Section 9.

As to the general rights and liabilities of purchaser under the conveyance.

(9.) *As to the general rights and liabilities of purchaser under the conveyance.*

If the conveyance be executed during the existence of a tenancy, the purchaser of the reversion, although merely for years (r), thereupon becomes entitled to the accruing (s) and

(p) *Garden* v. *Ingram*, 23 L. J. Ch. 478.

(q) See *Poole* v. *Adams*, 12 W. R. 683, V.-C. K.

(r) *Harmer* v. *Bean*, 3 Car. & K. 307.

(s) *Flight* v. *Bentley*, 7 Sim. 149; and a parol agreement for apportionment is invalid, *Flinn* v. *Calow*, 1 Mann. & G. 589.

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Purchaser's right to rent, if property in lease, &c.

future rent, whether reserved at short periods or half yearly (*t*); and may recover it by action, or (after giving notice of the conveyance) by distress (*u*): but he cannot recover arrears due before the conveyance (*x*); or subsequent rent which the tenant, in ignorance of the conveyance, has paid to the vendor (*y*). So, it would appear, the purchaser of a part only of a rent-charge, may, after conveyance, distrain for his proportionate part (*z*): but a severance of the reversion destroys the right to distrain for by-gone rent (*a*). The Act 4 & 5 Will. IV. c. 22 for the apportionment of rents (*b*) does not appear to apply to the case of a sale; or, as between vendor and purchaser, to affect the latter's right to accruing rents (*c*). By the Apportionment Act, 1870 (*d*), all rents (*e*) are, like interest on money lent, to be considered as accruing from day to day, and are made apportionable in respect of time accordingly; but the Act

(*t*) *Hughes* v. *Wells*, 1 Dav. C. 2nd edit. 513.

(*u*) *Moss* v. *Gallimore*, Doug. 266; although the rent was due at the date of the notice; *Rogers* v. *Humphreys*, 4 Ad. & E. 299; and see *Cadle* v. *Moody*, 7 Jur. N. S. 1249.

(*x*) *Flight* v. *Bentley*, 7 Sim., see p. 151.

(*y*) 4 Anne, c. 16, s. 10; *Birch* v. *Wright*, 1 T. R., see p. 385.

(*z*) *Rivis* v. *Watson*, 5 M. & W. 255.

(*a*) *Stavely* v. *Alcock*, 16 Q. B. 636; see *Beer* v. *Beer*, 12 C. B. 60.

(*b*) 4 & 5 Will. IV. c. 22.

(*c*) See and consider *Browne* v. *Amyot*, 3 Ha. 173; *Beer* v. *Beer*, 12 C. B. 60. For decisions under the Act, see *Knight* v. *Boughton*, 12 Beav. 312; *Lock* v. *De Burgh*, 4 De G. & Sm. 470, deciding that rents are apportionable as between the real and personal representatives, where the lease is granted *after*, but under a power created *before* the Act came into operation; see also *Re Clulow's Estate*, 3 K. & Jo. 689: but a devisee for life is not entitled, as against the remainderman, to apportionment upon parol leases from year to year created by the testator, and not determined by himself by act *inter vivos*; *Cattley* v. *Arnold*, 1 Johns. & H. 651: and it seems now well settled that the Act applies to all cases where either the lease reserving the rent, or the deed creating the life interest, are subsequent in date to the Act; *Plummer* v. *Whiteley*, Johns. 585; *Llewellyn* v. *Rous*, L. R. 2 Eq. 27. Dividends declared by joint-stock companies are not apportionable; *Re Maxwell's Trusts*, 1 H. & M. 610; *Bates* v. *Mackinley*, 31 Beav. 280; unless, perhaps, the dividends are payable on certain precise days. Orders of the Court are not instruments in writing within the meaning of the Act; see *Re Lawton's Estate*, L. R. 3 Eq. 469; *Jodrell* v. *Jodrell*, L. R. 7 Eq. 461; but an award of the Tithe Commissioners has been held to be so; *Heasman* v. *Pearse*, L. R. 8 Eq. 599.

(*d*) 33 & 34 Vict. c. 35.

(*e*) The term includes rent-service, rent-charge, rent-seck, tithes, and periodical payments in lieu of or in the nature of rent or tithe.

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expressly provides that the person liable to pay the rent is not to be resorted to for an apportioned part; but the entire rent is to be paid to the person who would have been entitled to receive it, if not apportionable; and the right to an apportioned part is to be enforced against him, not against the tenant (*f*).

And to sue for breach of covenant.

So, if the tenancy be under a lease by deed (*g*), for a term which is subsisting at the date of the conveyance, the purchaser of the reversion may sue upon breaches of covenants which occurred before conveyance (*h*); but not, it would seem, if the lease be determined before the conveyance, although the tenancy continue (*i*). His right to sue exists, although he have purchased the reversion only of part, or even of only an undivided part (*k*), of the demised premises; and, although the term may, as respects the residue of the premises, have merged in the reversion (*l*): but he cannot enter in respect of a breach of condition which occurred prior to the conveyance of the reversion (*m*); nor, until the recent Statute (*n*), could he enter for conditions broken, unless he had the reversion in the entirety (*o*). An entry might, however, be made by the purchaser of the immediate part of the reversion in the entirety; *e. g.*, if a termor underlet to A., and then assigned to B. the whole of the demised premises for the residue of the original term wanting one day, B. might and may enter for condition broken by A. (*p*) subsequently to the assignment (*q*). And in none of the above cases is it necessary that the tenant should attorn to (*r*), or otherwise

To re-enter.

(*f*) Sect. 4.

(*g*) *Standen* v. *Christmas*, 10 Q. B. 135.

(*h*) Sug. 181.

(*i*) See *Johnson* v. *St. Peter's, Hereford*, 6 Nev. & M. 106, 115.

(*k*) *Badeley* v. *Vigars*, 4 El. & B. 71.

(*l*) *Treynam* v. *Pickard*, 2 B. & Ald. 105.

(*m*) *Crane* v. *Batten*, 23 L. T. 220; and see *Hunt* v. *Remnant*, 9 Exch. 635.

(*n*) 22 & 23 Vict. c. 35, sect. 3, and *vide infrà*, p. 815.

(*o*) *Wright* v. *Burroughes*, 4 De & L. 431, see p. 448; 32 Hen. VIII. c. 34.

(*p*) *Wright* v. *Burroughes*, *ubi suprà*.

(*q*) *Crane* v. *Batten*, *ubi suprà*.

(*r*) See 4 Anne, c. 16, s. 9; Doug. 269: reporter's note to *Browne* v. *Storey*, 1 Mann. & G. 128. See *Doe* v. *Brown*, 2 El. & B. 331.

acknowledge the title of, the purchaser. Where the lease is by writing not under seal, the right to sue upon it as a contract does not pass with the reversion; and the lessor may, after conveying the reversion, sue the lessee in respect of breaches of agreement (*e. g.*, to repair the premises), committed during the tenancy but subsequently to the conveyance of the reversion (*s*): but the assignee of the reversion may maintain an action against the tenant for use and occupation (*t*).

Next estate is now the reversion.

Under a modern Act, where the immediate reversion on a lease is surrendered or merged after the 1st of October, 1845, the next estate is to be deemed the reversion as respects both rights and liabilities (*u*): and this clause is retrospective (*x*).

And, under a late Act, where the reversion on a lease is severed, and the rent is *legally* apportioned (*y*), the assignee of each part of the reversion has in respect of his apportioned rent, the benefit of the original conditions or powers of re-entry for non-payment (*z*). And, by the same Statute, a licence, or partial licence, to do any act which, without such licence, would create a forfeiture, or give a right to re-enter does not destroy the right of re-entry in respect of any subsequent breach of condition by the licensee, or any breach by his co-lessee (*a*): and, by a supplemental statute, the effect of an actual waiver is confined to the particular breach to which the waiver specially relates (*b*).

Tenancy continues until determined.

A subsisting tenancy will continue after the purchase, upon the same terms as previously; until it be regularly determined by either the purchaser or the tenant (*c*).

(*s*) *Bickford* v. *Parson*, 5 C. B. 920; *Standen* v. *Christmas*, 10 Q. B. 135.

(*t*) *S. C.*

(*u*) 8 & 9 Vict. c. 106, s. 9.

(*x*) *Upton* v. *Townend*, 17 C. B. 50. As to the remedies of remaindermen or reversioners on leases granted under powers, see *Greenway* v. *Bart*, 18 Jur. 449, Q. B.

(*y*) As to apportionment, see Dav. Conv. vol. i. p. 472, *et seq.*

(*z*) 22 & 23 Vict. c. 35, s. 3.

(*a*) Sects. 1 & 2.

(*b*) 23 & 24 Vict. c. 38, s. 6.

(*c*) *Greenwood* v. *Bairstow*, 5 L. J. N. S. Ch. 179.

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Purchaser's rights and liabilities, as lessee, cease on conveyance.

Where the purchaser is himself lessee, the execution of the conveyance at once determines all the covenants in the lease which subsisted between himself and the vendor as lessee and lessor (*d*). So, the purchase by a lessee of part only of the demised land, will destroy his right of pre-emption over the residue (*e*).

Vendor retaining possession, not liable for use and occupation.

Encroachments.

It has been held, that the mere retention by the vendor of the actual possession of the property, subsequently to the execution of the conveyance, will not subject him to an action by the purchaser for use and occupation (*f*). If he make encroachments, these will presumably be for the benefit of the purchaser (*g*).

Purchaser's will, how affected by conveyance.

We have seen (*h*) that, under the old law, where a testator, having entered into a contract for purchase which was not binding on the vendor, devised the estate, such devise was inoperative on any interest which he subsequently acquired in the property; although a case of election might, in some cases, be raised against the heir: so, also, if, having contracted for an estate, he devised it, and then took a conveyance in terms inconsistent with the contract, the devise was thereby revoked: but that a devise contained in a will coming within the provisions of the Act of 1 Vict. c. 26, will pass to the devisee the rights, whatever they may be, acquired by the testator under the subsequent conveyance (*i*).

Purchase of equity of redemption, whether real or personal estate liable to mortgage debt.

Upon the purchase of an estate in mortgage, the debt as between the purchaser's real and personal representatives, *primâ facie*, and in the absence of evidence of a contrary intention, and in cases not affected by Locke King's Act (*k*), remains primarily charged on the land. Such intention is not evidenced by a mere covenant with the *mortgagor* to

(*d*) 1 Bli. 69.

(*e*) *Sparrow* v. *Cooper*, 1 Hay & J. 504; *et vide suprà*, p. 272.

(*f*) *Tew* v. *Jones*, 13 M. & W. 12; *vide suprà*, p. 439.

(*g*) *Doe* v. *Tidbury*, 14 C. B. 304.

(*h*) *Suprà*, p. 267.

(*i*) *Sed vide suprà*, p. 269.

(*k*) 17 & 18 Vict. c. 113; and see now the Amendment Act, 30 & 31 Vict. c. 69.

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pay the debt (l); nor does such a covenant create any personal liability to the mortgagee (m), nor come within the operation of a charge of debts in the purchaser's will (n). A similar covenant with the *mortgagee* may, perhaps, be sufficient for the purpose (o); but the authorities do not clearly warrant this proposition in cases where the covenant is unaccompanied by a variation of the original contract for payment (p). A distinction, not altogether satisfactory, has been made between a contract for the purchase of the equity of redemption, and a contract for the purchase of the unencumbered estate at a price out of which the debt is eventually allowed in abatement; the personalty being, in the latter case, considered the primary fund (q): but, in one case, where the estate was proposed to be conveyed free from the mortgage, and the mortgagee was made a party to the conveyance, but did not execute it or receive his money, the debt was held to be primarily charged on the land (r).

Where part of purchase-money is borrowed and secured by mortgage of the estate.

It is clear, however, that a sum borrowed in order to complete the contract, even for paying off existing charges, and secured by a contemporaneous mortgage of the estate, is *primâ facie* payable primarily out of the personalty (s): and the same rule prevails when the consideration is an annuity, secured by a charge on the estate and by the purchaser's covenant (t).

Locke King's Act.

The general rule, as above stated, in respect to mortgage

(l) *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101, 152; *Evelyn* v. *Evelyn*, 2 P. Wms. 664; *Butler* v. *Butler*, 5 Ves. 534; *Barham* v. *Earl of Thanet*, 3 Myl. & K. 607, 624; *Barry* v. *Harding*, 1 J. & L. 475, 485; see, too, *Bond* v. *England*, 2 K. & J. 44; *Bagot* v. *Bagot*, 10 Jur. N. S. 1169.

(m) *Forrester* v. *Leigh*, Amb. 173; *Butler* v. *Butler*, 5 Ves. 534.

(n) *Duke of Ancaster* v. *Mayer*, 1 Bro. C. C. 454; 1 Wh. & T. L. C. 415; *Hamilton* v. *Worley*, 2 Ves. J. 62; *Butler* v. *Butler*, 5 Ves. 534.

(o) *Woods* v. *Huntingford*, 3 Ves. 128; *Lord Oxford* v. *Lady Rodney*, 14 Ves. 417; *Waring* v. *Ward*, 5 Ves. 670; 7 Ves. 332.

(p) And see Coote on Mortgages, 3rd edit. 479.

(q) *Parsons* v. *Freeman*, Amb. 115; 2 P. Wms. note to 664 (Cox's edit.); *Belvedere* v. *Rochfort*, 5 B. P. C. 299; *Cope* v. *Cope*, 2 Salk. 449.

(r) *Barry* v. *Harding*, 1 J. & L. 475, 485.

(s) *Waring* v. *Ward*, 5 Ves. 670; 7 Ves. 332.

(t) *Yonge* v. *Furse*, 24 L. J. Ch. 643.

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debts, was altered by Locke King's Act (*u*); which provides that in the case of any person dying after the 31st December, 1854, seised of or entitled to any land or hereditaments, which at the time of his death are subject to the payment of any sum or sums of money by way of mortgage, and who shall not by his will, or by deed or other instrument, have expressed any contrary or other intention, the heir or devisee shall, as between the different persons claiming through the deceased, be primarily liable to the payment of the mortgage debt: but this provision is not to affect or diminish the rights of the mortgagee; nor the rights of any person claiming under a will, deed, or document, prior to the 1st January, 1855.

Cases within the Act.

In order to bring a case within the Act, the charge must be for a specified sum, and on a specified estate; a mere general charge by a testator on real estate in aid of his personalty is insufficient (*x*). The Act has been held to apply to the case of an equitable charge by memorandum and deposit of title deeds (*y*); and this decision does not appear to have been rested on the ground of there being an undertaking to execute a legal mortgage (*z*); so that, in principle, it would seem to apply to every case of equitable charge, although not strictly a mortgage. But a vendor's lien for unpaid purchase-money was held not to be a sum charged by way of mortgage within the Act, so as to entitle the heir or devisee to have it satisfied out of the personal estate (*a*). The Act applies to copyholds (*b*), but not to leaseholds (*c*).

Where the estate is a collateral security.

The Act provides that every part of the mortgaged land, according to its value, shall bear a proportionate part of the

(*u*) 17 & 18 Vict. c. 113.

(*x*) *Hepworth* v. *Hill*, 30 Beav. 476.

(*y*) *Pembrooke* v. *Friend*, 1 J. & H. 132; *Coleby* v. *Coleby*, L. R. 2 Eq. 803.

(*z*) In *Coleby* v. *Coleby*, there was such an undertaking; but this does not appear to have been the case in *Pembrooke* v. *Friend*.

(*a*) *Hood* v. *Hood*, 3 Jur. N. S. 684; *Barnwell* v. *Iremonger*, 1 Drew. & Sma. 255; but see *Lord Lilford* v. *Powys Keck*, L. R. 1 Eq. 347; and see now the Amendment Act, *infrà*.

(*b*) *Piper* v. *Piper*, 1 J. & H. 91.

(*c*) *Solomon* v. *Solomon*, 10 Jur. N. S. 331.

mortgage debts charged upon the whole; but, of course, this does not throw the primary liability on a security which is merely collateral (d).

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The statute does not operate against the Crown where there are no next of kin.

As against the Crown claiming in default of next of kin the devisee is not entitled to have the mortgage debt satisfied out of undisposed of personal estate (e).

As to the exceptions in the Act:

Where a testator, by a will made in 1847, devised his mortgaged real estate, and directed his debts to be paid out of his personalty, and by a testamentary instrument in 1861 merely gave a pecuniary legacy, but did not refer to the former will, it was held that the will must be treated as already made at the date of the Act; and that the devisee was entitled to have the mortgage debt satisfied out of the personal estate (f); so, the heir of an intestate, who before the 1st January, 1855, executed a mortgage, reserving the equity of redemption to himself and his heirs, is not within the exception (g); and an heir taking by descent an estate, the devise whereof has lapsed, is not a person "claiming under or by virtue of a will," within the Act (h).

What is proof of "a contrary intention."

As might have been anticipated, there have been numerous decisions as to what is evidence of a "contrary or other intention" within the meaning of the Act; but these have been rendered of little practical importance by the recent Amendment Act. It will be sufficient to remark that, in cases not coming within the Amendment Act, where a specific source of payment is provided or indicated, as where other real estate is devised in trust to sell and pay debts (i), or where there is a direction that the debts shall be paid

(d) *Stringer* v. *Harper*, 26 Beav. 33.

(e) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

(f) *Rolfe* v. *Perry*, 9 Jur. N. S. 853.

(g) *Piper* v. *Piper*, 1 Johns. & H. 91.

(h) *Nelson* v. *Page*, L. R. 7 Eq. 25.

(i) *Newman* v. *Wilson*, 31 Beav. 33; and see *Maxwell* v. *Hyslop*, L. R. 4 E. & Ir. Ap. 506, affirming L. R. 4 Eq. 407, where a Scotch estate charged with a Scotch heritable bond was held to be exonerated by a direction in an English will for payment of the testator's debts out of his residuary real and personal estate.

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out of the "personal estate" (*k*), it is considered that there is sufficient evidence of intention to exonerate the realty; but that no such intention is evidenced by a mere direction that the debts shall be paid (*l*), or shall be paid by the testator's "executors out of his estate" (*m*); or, generally, "shall be paid out of his estate" (*n*). Whether a simple direction that they shall be paid "by his executors," they not being also devisees in trust for sale of the real estate, would take the case out of the Act, is not clear; although such, it is conceived, would be the decision. It would seem that land devised upon trust for sale, and taken in its converted state, is not an interest in land within the Act (*o*).

Amendment Act, 1867.

But now by the Amendment Act it is provided, that in the construction of the will of any person dying after the 31st day of December, 1867, a general direction that all his debts shall be paid out of his *personal* estate is not to be deemed to be a declaration of an intention to exonerate the realty, unless such intention be further declared by words, expressly or by necessary implication, referring to mortgage debts (*p*): and in the construction of Locke King's Act, and of the Amendment Act, the word "mortgage" is extended to a lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator (*q*); but, as was suggested in the last edition of this work, a lien for unpaid purchase-money upon lands purchased by a person who dies *intestate*, is not within the Act (*r*). It is unfortunate that the opportunity was not embraced for expressly extending the meaning of the word to all equitable charges; which are as much within the mischief sought to be remedied, as

(*k*) *Moore* v. *Moore*, 1 De G. J. & S. 602; *Eno* v. *Tatham*, 9 Jur. N. S. 482.

(*l*) *Pembrooke* v. *Friend*, 1 Johns. & Hem. 132; see observations on this case in *Coote* v. *Lowndes*, L. R. 10 Eq. 376.

(*m*) *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & Jo. 347.

(*n*) *Brownson* v. *Lawrence*, L. R. 6 Eq. 1.

(*o*) *Lewis* v. *Lewis*, L. R. 13 Eq. 218.

(*p*) 30 & 31 Vict. c. 69, s. 1.

(*q*) Sect. 2. This section seems to be retrospective; but not to apply to the case of lands purchased by an intestate; *vide suprà*.

(*r*) *Harding* v. *Harding*, L. R. 13 Eq. 493.

mortgages properly so called. It was observed in the last edition that the Act does not meet the case of a testator directing his debts to be paid out of his residuary real and personal estate; and it was suggested that in such a case the specific devisee of an estate subject to a mortgage would be entitled to have it exonerated; but in a recent case, V.-C. Malins appears to have been of the contrary opinion, though it was not necessary to decide the point (s). In a still later case where part of a mortgaged estate was devised to A. for life, and the rest to B., who was residuary devisee, in fee, and there was a charge of debts on the residuary real estate, in the event of the personal estate proving deficient, it was held by Sir G. Jessel, M. R., that the life estate of A. was not exonerated, but was proportionately liable to keep down the interest on the mortgage (t).

Conveyance of equitable estate, why requisite.

Even in the case of a mere equitable estate, a conveyance seems to be necessary to enable the purchaser to enforce, as against third parties, any equities attaching to the property (u).

Conveyance with power of redemption,—when not a mortgage.

And we may here remark, that if a *bonâ fide* sale and absolute conveyance are accompanied by a power reserved to the vendor to re-purchase the property, this will not turn the transaction into a mortgage, if such does not appear to have been the intention of the parties. Thus, where A. sold a life estate to B., and there was a contemporaneous deed giving to A., who paid all the costs of the transaction, the right of re-purchase at the price paid, and B. entered into possession, and, after keeping up an insurance on A.'s life, had a surplus income from the property of about 6*l.* per cent. on his purchase-money, it was held that the transaction was a sale, and not a mortgage; and that A. was not entitled to an account of the rents and profits received by B. (x).

(s) *Lewis* v. *Lewis*, *ubi suprà.*

(t) *Sackville* v. *Smyth*, L. R. 17 Eq. 153; and compare *Brownson* v. *Lawrance*, L. R. 6 Eq. 1.

(u) See *Tasker* v. *Small*, 3 M. & C. 70; *per* Lord Cottenham, *suprà*, p. 240.

(x) *Alderson* v. *White*, 2 De G. & Jo. 97. The decision was rested on the true ground, *viz.*, the intention of the parties as appearing on the face of the instruments; but query whether the transaction was not intended and treated as a mortgage.

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Nor does the circumstance that the parties already stand in the relation of mortgagor and mortgagee preclude the former from making an absolute sale to the latter of the equity of redemption, coupled with a right of re-purchase (*y*). The best general test of the intention of the parties in these cases seems to be the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such re-purchase: if there is no such power there is no mortgage (*z*). A right of re-purchase must, as we have already observed (*a*), be exercised in its literal terms (*b*): and be promptly enforced (*c*).

Purchaser's remedy for injury to property through prior act of vendor.

It has been held, that a lessee can recover damages against the lessor for injury which, after the execution of the lease, is sustained by the property, through the prior negligent construction by the lessor of a sewer upon adjoining property retained by him (*d*): and the same right would seem to exist in case of a sale.

(*y*) *Gossip* v. *Wright*, 9 Jur. N. S. 592; *Ensworth* v. *Griffiths*, 5 Bro. P. C. 184.

(*z*) See *Perry* v. *Meddowcroft*, 4 Beav. 197, affirmed 203; *Williams* v. *Owen*, 5 M. & C. 303; *Verner* v. *Winstanley*, 2 Sch. & L. 393; *Neal* v. *Morris*, Beat. 597; but see *Fee* v. *Cobine*, 11 Ir. Eq. R. 406; *Ogden* v. *Battoms*, 1 Jur. N. S. 791.

(*a*) *Suprà*, p. 208.

(*b*) *Barrell* v. *Sabine*, 1 Vern. 268; *Ensworth* v. *Griffith*, 5 Bro. P. C. 184; *Davis* v. *Thomas*, 1 Russ. & M. 506; *Joy* v. *Birch*, 4 Cl. & F. 57, 89. See *Pegg* v. *Wisden*, 16 Beav. 239; *Brooke* v. *Garrod*, 3 K. & J. 608; affirmed 2 De G. & Jo. 82; and compare *Ward* v. *Wolverhampton Waterworks Co.*, L. R. 13 Eq. 243.

(*c*) See *Chesterman* v. *Mann*, 9 Ha. 206.

(*d*) *Alston* v. *Grant*, 3 El. & B. 128.

CHAPTER XV.

Chap. XV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE ADVERSE RIGHTS OF THIRD PARTIES.

1. *Purchaser without notice, protected by legal estate against prior claimants.*

2. *With mere equitable title, postponed to prior equitable claimants.*

3. *How far protected against defective execution of powers —against prior claimants who have encouraged him to purchase—and by Statute in various cases.*

4. *As to priority under the Registration Acts.*

5. *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates, and fraudulent or voluntary conveyances—equitable relief against purchasers with notice.*

6. *As to contribution to paramount charges.*

7. *Rights of third parties after conveyance in various cases.*

Section 1.

Where equities are equal, legal estate prevails.

(1) Where two persons have, in conscience, an equal claim to the same property, Equity will not interfere against the one who acquires a legal right to hold it; even although his equitable title be of later date than that of his opponent (*a*). The rule is subject to no exception—not even in favour of charities (*b*).

Purchaser buying, without notice, protected by legal estate;

Now no person can have an equity of a higher kind in respect to property, than that which arises from his having fairly bought and paid for it. The execution of a conveyance vesting the legal estate in a *bonâ fide* purchaser for valuable

(*a*) *Oxwick* v. *Plumer*, Bac. Abr. Mortgage, (E.) s. 3.

(*b*) *Att.-Gen.* v. *Wilkins*, 17 Beav. 285.

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consideration, or in his trustee, will, therefore, under the above rule, render his title indefeasible as against all equitable claimants, even for valuable consideration, of whose claims he had no notice prior to the execution of the conveyance (c), and actual payment of the purchase-money (d). Of course, if the purchaser knows of an incumbrance, either before (e) or after the execution of his conveyance, but before the payment of the whole of his purchase-money, he will be liable to the extent of any purchase-money which he subsequently, without the consent of such incumbrancer, pays to the vendor.

In what cases.

Where the contract has been completed by a conveyance which proves defective, by reason of some prior conveyance, charge, or incumbrance, the purchaser may, at any subsequent period, get in any outstanding legal estate (f), (unless held expressly in trust for an adverse claimant (g), or unless the party holding it has notice of some express prior trust or incumbrance (h),) and use it against all parties of whose claims he had no notice at the time of the completion of his purchase (i). Where the conveyance is executed and the

(c) *Wigg* v. *Wigg*, 1 Atk. 382, 384; *sed vide infrà*, p. 831.

(d) *Tourville* v. *Naish*, 3 P. Wms. 307; (where the money being secured by bond was held insufficient;) *Jones* v. *Stanley*, 2 Eq. Ca. Abr. 685, pl. 9; *Story* v. *Lord Windsor*, 2 Atk. 630; *Frere* v. *Moore*, 8 Pri. 475, 489; see *Davies* v. *Thomas*, 2 Y. & C. 234. Under the Irish Registration Act, the legal estate and want of notice are no protection against an equity arising under a prior registered instrument, *Hill* v. *Mill*, 12 Ir. Eq. R. 107; 3 H. L. C. 828; and all unregistered deeds, though prior in date, are absolutely void as against the registered deed; *Carlisle* v. *Whaley*, L. R. 2 E. & Ir. Ap. 391. The equity applies to purchasers as well of personal as of real estate; *Dawson* v. *Prince*, 2 De G. & Jo. 41; and see Lord Selborne's statement of the law on this subject in *Blackwood* v. *London Chartered Bank of Australia*, L. R. 5 P. C. C. 111.

(e) See *Rayne* v. *Baker*, 1 Giff. 241; 6 Jur. N. S. 366.

(f) *Basset* v. *Nosworthy*, Finch, 102; 2 Wh. & T. L. C. 1; and this notwithstanding the inadequacy of the consideration.

(g) *Saunders* v. *Dehew*, 2 Vern. 271; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556.

(h) *Carter* v. *Carter*, 3 K. & J. 617, and *vide infrà*, p. 829.

(i) *Stanhope* v. *Earl Verney*, 2 Ed. 81; and Mr. Butler's note to Co. Litt. 290, b., n.; *Willoughby* v. *Willoughby*, 1 T. R. 763; and see *Jones* v. *Smith*, 1 Ha. 43; and 1 Ph. 244. As to the priority acquired by registration, *vide infrà*. As to the equitable

purchase-money is secured, he may come into Equity to have it employed in discharge of newly discovered incumbrances (*k*), if created by the vendor or covered by his covenants for title (*l*): and where the conveyance has been executed, and part only of the money paid, before notice, he may, it is conceived, clearly avail himself of the legal estate as a security to the extent of the sum so paid.

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Although procured by fraud of a stranger.

And whatever may be the accident by which a purchaser has obtained a good legal title, and in respect of which he has paid his money and is in possession of the property, he is entitled to the benefit of it (*m*): and even the circumstance of the execution of the conveyance having been procured by the fraud of a third party has not been allowed, in Equity, to prejudice an innocent purchaser without notice;—the deed remaining unimpeached at Law (*n*): but even an otherwise innocent purchaser can derive no advantage from the acquisition of the legal estate, if acquired by means of his own fraud, or the known fraud of another person (*o*).

Where the fraud is by a person in a fiduciary character.

Where a trustee of two different settlements, misapplied the trust funds under one, and transferred the trust funds of the other to make good the misappropriation, it was held that the transfer was, in effect, an alienation for value without notice; and that the *cestuis que trust* under the latter settlement could not follow the trust funds into the hands of the transferee (*p*). So where A., solicitor for B., a mortgagee, put up the mortgaged estate for sale without his client's authority, and bought it himself, and then procured B., who had been informed of the sale, to execute a convey-

right of a person to bar known existing adverse claims by fine and nonclaim under the old law, see *Langley* v. *Fisher*, 9 Beav. 90.

(*k*) 3 P. Wms. 307.

(*l*) *Suprà*, p. 805.

(*m*) *Per* L. J. James in *Pilcher* v. *Rawlins*, L. R. 7 Ch. Ap. 259, 270.

(*n*) *Hiorns* v. *Holtom*, 16 Beav. 259.

(*o*) See and consider the judgments in *Pilcher* v. *Rawlins*, *suprà*, and in *Heath* v. *Crealock*, L. R. 10 Ch. Ap 22. Some expressions in the judgments of the Lords Justices in the latter case seem, if read by themselves, to go even beyond the doctrine as stated in the text; but which is conceived to be the true doctrine deducible from the two cases.

(*p*) *Thorndike* v. *Hunt*, 3 De G. & Jo. 563. See also *Case* v. *James*, 29 Beav. 512; 3 De G. F. & J. 256.

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ance and sign the endorsed receipt for the purchase money, on the faith of representations, which, however, were not considered to be such as affected the validity of the deed at Law, and A. afterwards deposited the title deeds with C. as security for an advance, it was held that C. had priority over B. (q).

Where vendor's title depends on a forged instrument.

And, for the above purposes, it has been considered immaterial that the vendor had no equitable interest in the property :—thus it has been held that a bare trustee, or a vendor whose apparent *equitable* title depends upon a forged instrument (r), or a false representation of facts (s), can make a good title to a purchaser paying his money without notice, and then, or subsequently, acquiring the legal estate by means of a valid assurance. But where A. procured a mortgage from B., without any consideration, and then deposited it as a security for money advanced to him by C., who had no knowledge of the circumstances under which the deed was originally obtained, it was of course held that C. could stand in no better position than A.; and that the deed, being void as to A., was also void as to C. (t). So, where a solicitor procured his client to execute a mortgage to himself, on the pretence that it was only a covenant for production of deeds like several which he had previously executed, and afterwards transferred the mortgage to a *bonâ fide* holder for value, it was held that the mortgage was void at Law, and the transfer was necessarily void also: and in such cases the Court will not merely abstain from enforcing the invalid securities, but will cause them to be cancelled (u).

Protection afforded although

In one case (x) which has been much discussed and which is now in effect overruled, where J. C., believing

(q) *Hunter* v. *Walters*, L. R. 7 Ch. Ap. 75.

(r) See *Jones* v. *Powles*, 3 M. & K. 581; and *Bowen* v. *Evans*, 1 T. & L. 284.

(s) *Young* v. *Young*, L. R. 3 Eq. 801; but see and consider observations of the Lords Justices in *Heath* v. *Crealock*, *ubi suprà*.

(t) *Parker* v. *Clarke*, 30 Beav. 54.

(u) *Vorley* v. *Cooke*, 1 Giff. 230.

(x) *Carter* v. *Carter*, 3 K. & Jo. 617.

himself to be entitled under his father's will to undivided shares in real estate, conveyed them to a *bonâ fide* purchaser for value (y), and subsequently a later will was discovered, under which J. C. took the fee simple in the entire estate—but only as trustee for himself for life, with remainder over, V.-C. Wood held that the purchaser was not entitled to hold the legal estate as against the *cestui que trust* in remainder; inasmuch as the will under which J. C. alone derived his title to the fee disclosed the existence of a trust inconsistent with an absolute beneficial ownership. But in a later case (z) where a mortgage was taken by trustees, disclosing the trust, and the surviving trustee reconveyed part of the property to the mortgagor on payment of a portion of the mortgage debt which he appropriated for his own use, and the mortgagor then conveyed the part so released to new mortgagees, suppressing, by the connivance of the trustee, both the prior mortgage and the reconveyance, the Court refused at the instance of the *cestuis que trust* to deprive the new mortgagees of the legal estate which they acquired by means of the reconveyance, although it formed no part of the title deduced. In the same case, the surviving trustee fraudulently procured an absolute conveyance to himself of other parts of the mortgaged property without payment of any consideration; and then, concealing both the trust and the prior mortgage, under which alone he had a legal title, conveyed the property to a new mortgagee; the Court in like manner declined to interfere to deprive the new mortgagee of the legal estate, which he innocently acquired by means of an assurance which formed no part of his apparent title.

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the legal estate is acquired by a different title from that which is deduced.

But the legal estate will not protect a purchaser against the claims of persons whose prior right to its protection was known to him before the completion of the purchase, even although the extent of such claims was unknown: for instance, where A., knowing that B. had a charge on the

Notice of another having better right to call for legal estate, is notice of all his equities.

(y) The transaction was in fact a mortgage.

(z) *Pilcher* v. *Rawlins*, L. R. 7 Ch. Ap. 259; reversing Lord Romilly, M. R., L. R. 11 Eq. 53.

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property, accepted a mortgage of the estate, relying on the mortgagor's covenants, and then got in an old outstanding term for years, it was held, that B., having, in respect of A.'s notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority, not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at the date of his advance (*a*). So, where a purchaser bought a leasehold messuage, which was subject to three mortgages, two only of which were disclosed to him, and took an assignment, and paid the purchase-money by cheque, but shortly afterwards, having some misgivings, stopped the cheque, and then, for the first time, had actual notice of the third incumbrance, but eventually, under a threat of legal proceedings, allowed the cheque to be paid to the vendor, it was held that he was not a purchaser without notice, and that he was bound to redeem the third mortgagee (*b*). In one case, a transfer of shares to a mortgagee, who had no notice of a trust affecting them, was upheld, notwithstanding that he received notice before the transfer was registered (*c*).

Legal estate got in from unsatisfied incumbrancer, available against subsequent incumbrancers.

It is clear that a purchaser by paying off, and getting in a legal estate from an *unsatisfied* mortgagee, may hold it as against all mesne incumbrances of which he had no notice at the time of completion; and this may be done *pendente lite*, at any time before a decree to settle priorities (*d*). Thus, in the case of *Bates* v. *Johnson*, which well exemplifies the rule, where there were successive mortgagees (the first taking the legal estate) of property subject to a prior trust, which was fraudulently concealed by the mortgagor, it was held that the last mortgagee might, after he had received notice of

(*a*) *Willoughby* v. *Willoughby*, 1 T. R. 763.

(*b*) *Tildesley* v. *Lodge*, 3 Sma. & G. 543.

(*c*) *Dodds* v. *Hills*, 2 H. & M. 424.

(*d*) *Belchier* v. *Renforth*, 5 Bro. P. C. 292; *Marsh* v. *Lee*, 2 Vent. 337; 1 Wh. & T. L. C. 611; *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 491; *Robinson* v. *Davison*, 1 Bro. C. C. 63; *Barnett* v. *Weston*, 12 Ves. 130; and see 11 Ves. 619; *Spencer* v. *Pearson*, 24 Beav. 266: the general doctrine will probably eventually be destroyed by a General Registration Act.

the trust, and pending a suit by the *cestuis que trust* for the redemption of the first mortgage, pay off the several prior incumbrancers, and, having obtained the legal estate, hold it until he was paid in full (*e*). In this case the claim of the first mortgagee was still unsatisfied when he parted with the legal estate, and the decision was quite in accordance with the earlier authorities. But whether the legal estate will afford a similar protection, when it is acquired from a *satisfied* mortgagee, who has notice of an intervening incumbrance, appears somewhat doubtful. The point was fully considered in *Carter* v. *Carter* (*f*); and the same learned judge, who afterwards decided the case of *Bates* v. *Johnson*, after remarking on the absence of any precise authority, laid it down that, although a purchaser, who bought without notice, may get in, and insist upon, an outstanding legal estate, which he acquires from a dry trustee, or a satisfied mortgagee, who has no notice of the intervening incumbrance, yet when the latter has such notice, he is constructively a trustee, and therefore may not transfer the protection of the legal estate.

Remarks on the cases.

There seems, however, to be no solid ground for this distinction A mortgagee, whether his incumbrance is satisfied or not, is, in a sense, a trustee of the legal estate for the parties entitled to redeem him. If, when he is paid off, he may not, by reason of his being a constructive trustee, transfer the legal estate to the prejudice of an intervening incumbrancer, of whose claim he has notice, it is equally his duty, while his debt remains unpaid, to offer the opportunity of redeeming, and the consequent protection of, the legal estate, to the persons who are successively entitled to redeem him, according to their several priorities. It is too late to question the rule which permits a purchaser who bought without notice, at any time before decree to pay off a first mortgagee who has notice of an intervening incumbrance,

(*e*) *Bates* v. *Johnson*, Johns. 304; and see cases there cited, and *Carter* v. *Carter*, 3 K. & J. 617; *Prosser* v. *Rice*, 28 Beav. 68; *Young* v. *Young*, L. R. 3 Eq. 801; see too *Pease* v. *Jackson*, L. R. 3 Ch. Ap. 576.

(*f*) 3 K. & Jo. 617; see and consider the judgment.

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and, after thus obtaining, to insist upon the legal estate: and the rule would be more consistent if it afforded a similar protection where the legal estate is acquired from a mere dry trustee, or from a mortgagee whose debt has been previously satisfied (*g*).

Notice of the trust, whether material.

In the reported cases where a purchaser for value, without notice of any prior claim at the date of his purchase, has been allowed to perfect his defective title by getting in an outstanding legal estate from a dry trustee, the fact of his having notice at the time that the person conveying the estate held it as such trustee has never been considered material; but in the case of *Pilcher* v. *Rawlins* (*h*), Sir W. M. James, L.J., appears to have considered, that where the person seeking the conveyance is aware of the fact that the trustee is a trustee for other persons and cannot convey without a breach of trust, whilst the trustee is left in ignorance, the rule which allows the protection of a legal estate so acquired cannot, on principle, be supported: and in a still more recent case (*i*), though it was not necessary to decide the point, Sir G. Jessel, M. R., expressed it as his opinion that where a trustee having notice of the trust conveys the legal estate without consideration, to an equitable incumbrancer who is not aware of the trust, the latter cannot thereby obtain any priority. In the case of an active trusteeship, there can, it is conceived, be no question that the legal estate acquired either from or by a person who has notice of the trust can afford no protection as against the claims of the *cestuis que trust*; but until the earlier authorities are overruled, or the law is amended, the legal estate, if acquired from a dry trustee, or even from an active trustee, would seem to be (except as against his *cestuis que trust*) available as a protection to an innocent purchaser without notice.

Where the holder of the

But, of course, if the trustee has executed a declaration in

(*g*) See Lord Hadwicke's judgment in *Willoughby* v. *Willoughby*, 1 T. R. 763, 771; *Peacock* v. *Burt*, 13 L. J. 35; and compare *Ex parte Knott*, 11 Ves. 613.

(*h*) L. R. 7 Ch. Ap. 268.

(*i*) *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556, 563.

favour of the incumbrancer, or if his trust involves the discharge of active duties, he can only transfer the property subject to the trusts upon which he holds it. Thus, where the person having the legal estate, holds it in the character of trustee for several successive incumbrancers, he may not create a priority by transferring it to any of them (*k*); and wherever the purchaser has notice of the existence of such a trust at the time of getting in the legal estate, he will take subject to the claims of the *cestuis que trust* (*l*).

outstanding legal estate is an express trustee.

Notice before conveyance, whether sufficient.

It has been held that notice to a purchaser, after payment of his purchase-money, but before execution of the conveyance, is sufficient to deprive him of the benefit of the legal estate (*m*). The particular facts do not clearly appear by the report; and the point is one which will, it is conceived, require much consideration when it again arises. There may be a difference between getting in the legal estate from the vendor himself, supposing him to have been privy to the prior charge, and getting it in from a bare trustee or mortgagee. In the latter case it seems difficult, consistently with the general rule now under discussion, to deny the purchaser's right to protection: nor does there seem to be any sufficient reason for denying it even in the former case.

Best right to call for legal estate a protection in Equity.

And where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in Equity be entitled to its protection (*n*). But this proposition in fact presupposes that the purchaser has a better equity than the other claimants; and therefore does

(*k*) *Sharples* v. *Adams*, 32 Beav. 213; see too *Colyer* v. *Finch*, 19 Beav. 500; 5 H. L. Ca. 905; *Marfield* v. *Burton*, L. R. 17 Eq. 15, and see Sir G. Jessel's comments in that case on *Sharples* v. *Adams*, p. 17.

(*l*) *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Ha. 272, affirmed 11 Jur. 527; *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556, and see judgment of Sir G. Jessel, M. R. And see the judgments in *Carter* v. *Carter*, and *Bates* v. *Johnson*, *ubi suprà*.

(*m*) *Wigg* v. *Wigg*, 1 Atk. 382; and see *Davies* v. *Thomas*, 2 Y. & C. Exch. 234.

(*n*) See *Blake* v. *Hungerford*, Prec. Ch. 158; *Wilker* v. *Bodington*, 2 Vern. 559; *Willoughby* v. *Willoughby*, 1 T. R. 763, 768; *Charlton* v. *Low*, 3 P. Wms. 328; *Ex parte Knott*, 11 Ves. 618; *Bowen* v. *Evans*, 1 J. & L. 264; *Parker* v. *Carter*, 4 Ha. 410.

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not come within the true principle of the general doctrine now under consideration; which is simply this, *viz.*, that when a party sets up the legal estate, the Court will not deal with it, to his prejudice, unless a superior equity be shown. And although the Court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers or purchasers, as to enable the anterior claimant to wrest the legal estate from the person who has obtained it without notice of the anterior claim (*o*).

Equity will not in general act against *bonâ fide* purchaser without notice.

And, as a general rule, a Court of Equity will not, by compelling the delivery (*p*) or discovery (*q*) of title deeds, or superseding a commission of bankruptcy (*r*), or otherwise (*s*), act adversely to a *bonâ fide* purchaser who has taken what purported to be a conveyance of the legal and equitable estates; or, perhaps, of such an equitable estate as apparently gave him an absolute and indefeasible right, (either immediately, or upon payment of a subsisting incumbrance,) to call for the legal estate; and has paid his purchase-money without notice of adverse claims (*t*).

Where the adverse claimant has a legal title.

The rule, however, has been held to be different where the adverse claimant has a legal title (*u*); but this doctrine has been disapproved of, and is opposed to later decisions (*x*).

(*o*) See *Rooper* v. *Harrison*, 2 K. & J. 86, 108.

(*p*) *Joyce* v. *De Moleyns*, 2 J. & L. 374; see, however, *Newton* v. *Newton*, L. R. 6 Eq. 135; but see now *Heath* v. *Crealock*, L. R. 10 Ch. Ap. 22, reversing on this point V.-C. B. L. R. 18 Eq. 215; and *vide infrà*.

(*q*) *Bassett* v. *Nosworthy*, Finch, 102; 2 Wh. & T. L. C. 1; *Bishop of Worcester* v. *Parker*, 2 Vern. 255; *Hall* v. *Adkinson*, *ibid.* 463; *Jerrard* v. *Saunders*, 2 Ves. J. 454, 457; *Burlace* v. *Cooke*, Freem. C. C. 24; *Millard's case*, *ibid.* 43.

(*r*) *Ex parte Edwards*, 10 Ves. 104; *Ex parte Leman*, 13 Ves. 271; *Ex parte Rawson*, 1 Ves. & B. 160, 164.

(*s*) 2 Ves. J. 458; *Wallwyn* v. *Lee*, 9 Ves. 24. See 3 K. & J. 638; *Turner* v. *Buck*, 22 Vin. Ab. 21.

(*t*) See and compare *Jerrard* v. *Saunders*, 2 Ves. J. 454; *Gait* v. *Osbaldeston*, 1 Russ. 158; *Head* v. *Egerton*, 3 P. Wms. 281; *Att.-Gen.* v. *Backhouse*, 17 Ves. 290; *Jackson* v. *Rowe*, 4 Russ. 514; and V.-C. K. B.'s judgment in *Penny* v. *Watts*, 13 Jur. 459; 2 De G. & S. 501; 1 Mac. & G. 150; *Lane* v. *Jackson*, 20 Beav. 535.

(*u*) See *Williams* v. *Lambe*, 3 Bro. C. C. 264; *Collins* v. *Archer*, 1 Russ. & M. 284.

(*x*) See *Payne* v. *Compton*, 2 Y. & C. 461; *Bowen* v. *Evans*, 1 J. & L.

Thus, in a late case at Law, it was held that the demandant in an action of dower cannot, under the Common Law Procedure Act, 1854, compel production of the conveyance to her husband, when, it is in the hands of a purchaser for value without notice of the right to dower (y). Chap. XV. Sect. 1.

In the case of *Stackhouse* v. *Lady Jersey* (z), V.-C. Wood qualified the doctrine that no relief will be given as against a purchaser for value without notice; and made a declaration and order in favour of a prior equitable claimant of whom the purchaser had no notice: and in the case of *Phillips* v. *Phillips* (a) the sufficiency of a plea of purchase for valuable consideration without notice as against an adverse equitable title, was further questioned by Lord Westbury. In that case, the plaintiff claimed a reversionary rent-charge, secured in the usual way, which did not fall into possession until long after the estate on which it was charged had been conveyed by the grantor to a purchaser for value without notice of an annuity, who bought subject to a legal mortgage in fee which had been created prior to the grant of the annuity, and was still outstanding when the suit was instituted. No payment of the annuity having ever been made, a bill was filed by the annuitant, seeking an account of what was due in respect of the annuity, and the usual consequential relief. The purchaser, by his answer, claimed the benefit of the 27 Eliz., and of the Statute of Limitations, but did not plead that he was a purchaser for value without notice; and it was held by Lord Westbury, affirming V.-C. Stuart, that the defence, not having been pleaded, was not available at the hearing: but his lordship's decision was mainly rested on the ground that, inasmuch as the legal estate was outstanding, the annuitant and the purchaser were in the

Phillips v. *Phillips.*

178, 264; *Joyce* v. *De Moleyns*, 2 J. & L. 374; *Att.-Gen.* v. *Wilkins*, 17 Beav. 285; *Finch* v. *Shaw*, 18 Jur. 936; 19 Beav. 500; 5 H. L. Ca. 905; *Colyer* v. *Finch*, 20 Beav. 555; *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721. But see *Titley* v. *Davies*, 2 Y. & C. C. C. 399.

(y) *Gomm* v. *Parrott*, 3 Jur. N. S. 1150.

(z) 1 J. & H. 721; see the judgment.

(a) 8 Jur. N. S. 145; affirming V.-C. Stuart, 7 Jur. N. S. 1094. See too *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721.

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position of mere equitable claimants, and that they must therefore rank according to the dates of their equitable titles. The rule here adopted is applicable to cases where the equities of the rival equitable claimants are in all respects equal except in point of time; but the ground on which the Court refuses to interfere, at the suit of a non-purchaser, as against a purchaser without notice, is that the latter has a superior equity; and whether he has, or has not, the legal title, cannot, it is conceived, affect the equitable doctrine. The decision has been strongly disapproved by Lord St. Leonards (*b*), who remarks that this is apparently the first case in which the validity of this defence as against an equitable title has been questioned.

Defence must be raised by answer.

Since the case of *Phillips* v. *Phillips*, it must be taken to be settled that a purchaser cannot avail himself of this defence, unless he sets it up by his answer (*c*).

Purchaser whether compellable to deliver up deeds.

We have already remarked (*d*) that a Court of Equity will not, as a general rule, interfere against a purchaser without notice by compelling him to deliver up or discover the title deeds which are in his possession. But a distinction has sometimes been drawn between cases where the sole object of the suit is the recovery of the title deeds, and cases where the Court is called upon to establish, and does establish a prior equitable title to the estate. In the former class of cases (*e*), it is quite clear that the Court will not deprive the purchaser without notice of the advantage which he has gained by the possession of the deeds; and which, where the other equitable rights are equal, may turn the scale in his favour: but in a case falling within the latter class it has been held that it will not permit its decree that a prior equitable claimant is entitled to the possession

(*b*) V. & P. 796, 798.

(*c*) See *Phillips* v. *Phillips*, *ubi supra*; but see *Lyne* v. *Lyne*, 21 Beav. 318, where the defence was held available, though not raised by the answer.

(*d*) *Supra*, p. 761.

(*e*) *Wallwyn* v. *Lee*, 9 Ves. 24; *Joyce* v. *De Moleyns*, 2 J. & Lat. 374; and see cases cited in *Newton* v. *Newton*, L. R. 4 Ch. Ap. 143.

of the estate (which of itself confers the right to the possession of the deeds (*f*)) to be deprived of its full efficacy, by allowing them to remain in the hands of a defendant, who claims under an adverse title which the Court has declared to be invalid (*g*); but this distinction does not seem to rest on any solid ground, and, in a very recent case (*h*) was not recognized by the Court of Appeal. In the case referred to, a foreclosure suit by a legal mortgagee against the mortgagor and purchasers from him for value of parts of the mortgaged estate without notice of the mortgage, which was fraudulently suppressed by the mortgagor, V.-C. Bacon made a decree for sale of the property and for delivery of the title deeds by the purchasers for the purpose of effecting the sale (*i*): but on appeal the decree was varied by directing foreclosure instead of sale, and the order for the delivery of the deeds was reversed, on the ground that as the Court would not in a suit instituted for the special purpose compel their delivery, it ought not do so indirectly, merely for the purpose of effectuating its own decree (*k*).

Whether compellable to produce them.

In one case (*l*), V.-C. Giffard, having decided against the claim of an incumbrancer without notice to the possession of the estate, felt himself constrained by the authorities of *Wallwyn* v. *Lee*, and *Joyce* v. *De Moleyns*, not to deprive him of the custody of the deeds, but ordered him to produce them for the purposes of a sale of the property. Whether such an order is consistent with the principle of the decision of the full Court of Appeal, in *Heath* v. *Crealock*, may perhaps be doubted. The whole doctrine, however, of recognizing the existence of an interest in muniments of title, separate and apart from the lands to the title of which they relate, seems open to observation.

(*f*) *Smith* v. *Chichester*, 2 D. & War. 402.

(*g*) *Newton* v. *Newton*, L. R. 4 Ch. Ap. 143; L. R. 6 Eq. 135.

(*h*) *Heath* v. *Crealock*, L. R. 10 Ch. Ap. 22.

(*i*) L. R. 18 Eq. 215.

(*k*) L. R. 10 Ch. Ap. 22; see and consider the judgment.

(*l*) *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139.

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General remarks on the doctrine.

The obvious tendency, if not the actual result, of the recent decisions has practically been to limit the efficacy of a plea of purchase for value without notice to cases where the purchaser has acquired the legal estate, and has therefore little need of the protection. If the rule which obtains as to the purchase of equitable *choses in action* is also to prevail as to the acquisition of equitable estates in land, the question of priorities can seldom arise; for each equitable claimant will take subject to all prior equities. Such a doctrine rests on the simple ground that the conveyance of a mere equitable interest is innocuous, and that the equitable owner can only pass the estate subject to the prior equities affecting it; but it is not in accordance with the principle on which the earlier cases were decided; and, in the present state of the authorities, cannot be settled by the judicial decision of any inferior court.

The law on the entire subject is evidently in an unsatisfactory state, and the 7th section of the Vendor and Purchaser Act, 1874, which was intended to improve it, has been universally regarded as a failure, and will in all probability be repealed before the publication of these remarks. Whether any other provision will be substituted for it is not yet known; but in any amendment of the law it is suggested that the true rule ought to be that where the legal estate has been stipulated for and acquired in conformity with the terms of the original bargain, or any subsequent modification of it for value, or, whether so stipulated for or not, has been subsequently acquired without notice of any conflicting claim, a purchaser for value should not be deprived of its protection; even in cases where, as in *Pilcher* v. *Rawlins*, the vendor or other party who conveys it, has acquired it by means of a fraud of which the purchaser had no notice, and which he could not by reasonable diligence have discovered: but that in a general struggle for priorities between equitable claimants, no claimant should be able to gain priority after notice of any conflicting claim, by getting in an outstanding legal estate, whether from a

satisfied or an unsatisfied mortgagee, or from a mere dry trustee, or from a trustee who has active duties to perform in connection with his trust.

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Section 2.

(2.) *Purchaser with mere equitable title, is postponed to prior equitable claimants.*

Purchaser with mere equitable title, is postponed to prior equitable claimants.

Where the purchaser has neither taken a conveyance of the legal estate, nor taken such a conveyance of the equitable estate as would seem to give him an absolute and indefeasible right to call for the legal estate, the ordinary rule of Equity, "*Qui prior est tempore potior est jure*," will be allowed to operate in favour of an adverse claimant having, in other respects, an equal equity (*m*). In a case, in which the prior authorities were fully reviewed, the rule was thus stated: "as between equitable incumbrances, relief will be given to the incumbrancer prior in point of date, unless he has lost his priority by his own act or neglect; and relief will not be refused to him, as against a subsequent incumbrancer, on the sole ground of the latter being a purchaser for value without notice, unless he has the legal estate, or the best right to call for it" (*n*). Thus, where a mortgagee lent money upon a conveyance of what he knew to be a mere equity of redemption, it was held by Lord Thurlow, that he must be postponed to mesne incumbrancers of whom he had no notice (*o*); and the decision has been several times recognised by Lord Eldon (*p*): so, where bankers took an equitable mortgage by deposit of title deeds of an estate which was subject to a secret trust of which they had no notice, it was held, that such trust must

As between mere equitable claimants, prior title prevails.

Mortgagees by deposit, bound by secret trust.

(*m*) *Rice* v. *Rice*, 2 Dr. 85; *Lane* v. *Jackson*, 20 Beav. 535, case of mortgagee and judgment creditor, and see *Thorpe* v. *Holdsworth*, *infrà*, and cases there cited.

(*n*) Per V.-C. Giffard in *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139; and see *Rooper* v. *Harrison*, 2 K. & Jo. 86; *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721.

(*o*) *Beckett* v. *Cordlay*, 1 Bro. C. C. 353.

(*p*) See 1 Gl. & J. 243; 6 Ves. 192; 2 Russ. 214; and see *Jones* v. *Jones*, 8 Sim. 642; and *Tourville* v. *Naish*, 3 P. Wms. 308.

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prevail against their security (q): so, a purchaser of a legacy takes subject to the liability to refund for payment of debts (r): and, as a general rule, the purchaser of an equitable *chose in action* takes it subject to all prior equities (s): and the rule applies even in cases where the purchase is made in market overt, and in the ordinary course of business (t): but a prior incumbrancer, seeking the aid of Equity against a *bonâ fide* purchaser without notice, should be prompt in his proceeding (u).

In one case (x), where A., an owner of railway bonds, entered into a contract with B., who falsely represented himself to be the vendor's agent, for the purchase of an estate to be paid for by means of the bonds, and one of them was transferred in part payment to B., who assigned it over for value to C., who had no notice of the fraud, it was held that A. could not sustain a suit against C. for the delivery of the bond. The deposit of the bond was treated as merely giving a right of action against the depositee in case the purchase fell through, and not as constituting him a trustee for the purchaser, so as to attach any equity to the bond.

On purchase of equitable

And it has been decided in several cases (y), that, as

(q) *Manningford* v. *Toleman*, 1 Coll 670; and see *Att Gen.* v. *Flint*, 4 Ha. 156; *Stackhouse* v. *Lady Jersey*, 1 J & H. 721.

(r) *Jennings* v. *Bond*, 2 J. & L. 720; but see *contrà* as to legacy duty, *Farwell* v. *Seale*, 3 De G. & S 359.

(s) *Priddy* v. *Rose*, 3 Mer. 86 *Morris* v. *Livie*, 1 Y. & C. C. C. 380 *Molloy* v. *French*, 13 Ir. Eq. 261 *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Cockell* v. *Taylor*, 15 Beav. 103 *Smith* v. *Parkes*, 16 Beav. 115; *Ford* v. *White*, 16 Beav. 123; *Cole* v. *Muddle*, 10 Ha. 186; *Mangles* v. *Dixon*, 3 H. L. C. 702, 735; *Clack* v. *Holland*, 19 Beav. 262; *Irby* v. *Irby*, 4 Jur. N. S. 989; *Brandon* v. *Brandon*, 7 De G. M. & G. 365; *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294; *Rolt* v. *White*, 31 Beav. 520; *In re Natal Investment Company*, L. R. 3 Ch. Ap. 355.

(t) *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294.

(u) See *Sibson* v. *Fletcher*, 1 Ch. R. 32; *Wallace* v. *Marquis of Donegal*, 1 Dru. & Wal. 461, 488.

(x) *Ashwin* v. *Burton*, 9 Jur. N. S. 319.

(y) *Peacock* v. *Burt*, Coote on Mortgages, 569; *Jones* v. *Jones*, 8 Sim. 633; *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Wilmot* v. *Pike*, 5 Ha. 14; *Bugden* v. *Bignold*, 2 Y. & C. C. C. 392; *Rooper* v. *Harrison*, 2 K. & J. 185;

respects equitable estates in land, the priority of a purchaser or incumbrancer is not affected by his giving, or neglecting to give, notice of his purchase or security, to the trustees, mortgagees, or other persons in whom the legal estate may happen to be vested; and that the ordinary rule, as to notice of assignments of *choses in action*, does not apply. But the rule holds good in respect to the proceeds of sale of real estate vested in trustees upon trusts for sale; although no sale may have been effected (*z*).

Interest in land, no priority acquired by notice to owner of legal estate.

We may remark that notice of an equitable assignment of a *chose in action*, given *before* the fund has come into the hands of the trustee or stakeholder, does not affect the question of priorities (*a*): thus, an equitable assignee, who gave notice before the fund was parted with, was held entitled to priority over a subsequent assignee who had given earlier notice (*b*).

Effect of premature notice.

Where the property is subject to a concealed incumbrance it seems that a purchaser of part, having merely the equitable estate, may throw the entire charge upon a subsequent innocent purchaser of the equitable estate in the residue (*c*).

Concealed incumbrance thrown wholly on puisne equitable purchaser.

Incumbrances in favour of a charity seem to be subject to the same rules as those in favour of a private individual; except that notice to the first purchaser is said to bind subsequent purchasers without notice (*d*): but if the incumbrance be merely equitable, it seems that the purchaser

Rule as to priority, how far applicable as against charities.

but see *Cathrow* v. *Eade*, 21 L. T. 179: and as to judgment debts, *Stocks* v. *Dobson*, 17 Jur. 539; and see *Consolidated Investment, &c., Company* v. *Riley*, and V.-C. Stuart's comments on *Wiltshire* v. *Rabbits*, 1 Giff. 371; 5 Jur. N. S. 1283.

(*z*) *Lee* v. *Howlett*, 2 K. & J. 531; *Re Hughes' Trusts*, 2 H. & M. 89; *Consolidated Investment, &c., Company* v. *Riley*, 1 Giff. 371; 5 Jur. N. S. 1283.

(*a*) *Webster* v. *Webster*, 31 Beav. 393; *Somerset* v. *Cox*, 33 Beav. 634.

(*b*) *Buller* v. *Plunkett*, 1 J. & H. 441.

(*c*) See *Hartley* v. *O'Flaherty*, Llo. & G. tem Pl. 208, 216; *Averall* v. *Wade*, Llo. & G. tem. Sug. 252; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444, 474; *Hughes* v. *Williams*, 3 M. & G. 683.

(*d*) *East Grinsted case*, Duke's Charitable Uses, 640: *sed qy.*; and see *Commissioners of Charitable Donations* v. *Wybrants*, 2 J. & L. 194.

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without notice is not affected by it (e). We may remark here that before the 3 & 4 Will. IV. c. 27, mere length of possession was no protection, in Equity, to a purchaser who bought with notice of the charitable trust (f): but it would seem that a purchaser with notice of the charitable trust is only liable for the rents and profits which have accrued since his purchase (g).

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(3.) *Purchaser, how far protected against defective execution of powers;—against prior claimants who have encouraged him to purchase;—and by Statute in various cases.*

Purchaser, how far relieved against defective execution of powers.

Equity will supply the defective execution of a power, if the defect consist merely in the non-observance of some required formality (h); but not if such formality be positively required by the Legislature (i): nor can it supply a defect which goes to the species of the power; as where a power to appoint by will is attempted to be executed by deed (k): and the Legislature has expressly excluded the interference of Equity, where a contract by a tenant in tail is not perfected in manner required by the 3 & 4 Will. IV. c. 74 (l).

22 & 23 Vict. c. 35.

By the 22 & 23 Vict. c. 35 (m), a deed executed in the presence of, and attested by, two or more witnesses in the usual way, is, so far as respects the execution and attestation thereof, to be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary,

(e) Sug. 722; Tudor's Charitable Trusts, p. 333.

(f) *Att. Gen.* v. *Mayor of Coventry*, 2 Vern. 399; *Att.-Gen.* v. *Christ's Hospital*, 2 Myl. & K. 344: as to the effect of the statute, *vide suprà*, p. 382.

(g) Tudor's Charitable Trusts, p. 333.

(h) See Sug. Pow. 8th edit. pp. 530, *et seq.* But see 6 Mann. & G. 429, n. See as to married women, *Hughes* v. *Wells*, 9 Ha. 749.

(i) Sug. 501, 742.

(k) *Reid* v. *Shergold*, 10 Ves. 370; *Archibald* v. *Wright*, 9 Sim. 161.

(l) See sect. 47. And see on this point, *Pryce* v. *Bury*, 2 Drew. 11; and compare *Davis* v. *Tollemache*, 2 Jur. N. S. 1181; and see Lord St. Leonards' comments, Sug. V. & P. 468.

(m) See sects. 12 & 13.

notwithstanding that any additional or other formalities may have been expressly imposed upon an exercise of the power: but this provision does not dispense with any consent, or with the performance of any act, not relating to the mode of execution or attestation, which may be required by the instrument creating the power: nor does it prevent the donee from exercising it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed. We may also refer here to the provisions of the late Wills Act (n); by which an appointment by a will, executed in the ordinary form, is made valid, although all the formalities prescribed by the instrument creating the power have not been observed.

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Relieved against incumbrancers, &c., who encourage purchase of the property.

The purchaser will also be protected in Equity against any person, (even an infant or married woman,) who having a prior interest in the property, encourages, or permits him to complete his purchase in ignorance of its existence (o): and if a married woman, having the opportunity, does not repudiate her fraudulent act committed under her husband's coercion, she will be bound by it as against a purchaser who bought without notice. Thus, where a woman, shortly after her marriage, under threats from her husband, wrote and signed a paper, dated before the marriage, whereby she purported to give him her reversionary interest in a sum of stock, which the husband subsequently sold to a purchaser who had no notice of the fraud, and the wife, on being applied to on his behalf, and not being then under duress, stated that she had before her marriage made over her

(n) 1 Vict. c. 26, sect. 10.

(o) See *Watts* v. *Cresswell*, 2 Eq. Ca. Abr. 515; *Savage* v. *Foster*, 9 Mod. 35; *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Draper* v. *Borlace*, *ib.* 370; *Berrisford* v. *Milward*, 2 Atk. 49; *Gorett* v. *Richmond*, 7 Sim. 1; *Clare* v. *Earl of Bedford*, 13 Vin. Ab. 536; *Boyd* v. *Belton*, 1 J. & L. 730; *Thompson* v. *Simpson*, 2 J. & L. 110; *Overton* v. *Banister*, 3 Ha. 503; *Nicholson* v. *Hooper*, 4 Myl. & C. 179; *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 62, 88; see further as to infants, *Stikeman* v. *Dawson*, 1 De G. & S. 90; *Esron* v. *Nicholas*, *ib.* 118; *Wright* v. *Snowe*, 2 De G. & S. 321; *In re King*, 3 De G. & Jo. 63; *Nelson* v. *Stocker*, 4 De G. & Jo. 458; *Sharpe* v. *Foy*, L. R. 4 Ch. Ap 35; fraud by married woman; and see *Re Lush's Trusts*, L. R. 4 Ch. Ap. 591; and see and distinguish *Arnold* v. *Woodhams*, L. R. 16 Eq. 29; and *vide suprà*, pp. 3, 11.

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interest to her husband, it was held that, as against the purchaser, she had lost her equity to a settlement when the fund fell into possession (*p*). So, where a married woman fraudulently concealed a settlement, in order to induce a mortgagee to advance his money, and the mortgage was completed, but, before the deed was acknowledged by the married woman, the mortgagee received notice of the settlement, it was held that her estate was bound, and that she could not defeat the mortgage (*q*).

Effect of misrepresentation.

A misrepresentation will bind the party making it, although he make it in ignorance or mistake, if he might have known the truth (*r*): and, where it is material, the purchaser may elect either to have it made good or the purchase set aside (*s*): but a mortgagee, it appears, need not answer an inquiry as to the extent of his claims, unless the intended purchaser be entitled and offer to redeem him (*t*); nor need he voluntarily communicate his claim to a person whom he knows to be about to purchase (*u*); unless he have reason to believe that a fraud is contemplated by the vendor (*x*). Nor will mere assent to a purchase bind the assenting party's subsequently acquired interest in the property (*y*).

Subsequent expenditure on the property.

The purchaser will also be protected in Equity against any person who, knowing his own title, encourages, or fraudulently permits the former, in ignorance of it, to lay out money in improving the property (*z*): but when a party

(*p*) *Re Lush's Trusts*, L. R. 4 Ch. Ap. 591.

(*q*) *Sharpe* v. *Foy*, L. R. 4 Ch. Ap. 35.

(*r*) See *Pearson* v. *Morgan*, 2 Bro. C. C. 388; and *West* v. *Jones*, 1 Sim. N. R. 205, *suprà*, p. 106, where the rule is laid down yet more generally; *Hammersley* v. *De Biel*, 12 Cl. & F. 83; *Att.-Gen.* v. *Stephens*, 1 K. & J. 749; *Crofts* v. *Middleton*, 2 K. & J. 299; but see Sug. p. 744, n., where Lord St. Leonards seems inclined to restrict the operation of this rule to the case of fraud.

(*s*) *Rawlins* v. *Wickham*, 3 De G. & Jo. 304.

(*t*) *Suprà*, p. 450.

(*u*) *Osborn* v. *Lea*, 9 Mod. 97.

(*x*) *Vide suprà*, p. 450.

(*y*) *Thompson* v. *Simpson*, 2 J. & L. 110; *Mangles* v. *Dixon*, 3 H. L. C. 733; see *Money* v. *Jorden*, 15 Beav. 372; 2 De G. M. & G. 318; 5 H. L. C. 185.

(*z*) *Kenney* v. *Browne*, 3 Ridg. P. C. 518.

has once given a distinct notice of his claim, and the purchaser subsequently lays out money, it lies on him to show that the other has abandoned, or given reason to believe that he has abandoned, his claim (*a*); and this, whether the claim extend to the entirety, or only an undivided part of the estate (*b*). Nor need the notice disclose the particulars of the claimant's title; nor, if the claim exceed what he is entitled to, is the party in possession therefore justified in disregarding it (*c*). But though a general notice of the claimant's title, as *e.g.*, of the deed under which he claims, may be sufficient, it will be otherwise where it is accompanied by an imperfect or erroneous statement of its contents (*d*); and where a purchaser acquires merely a temporary or partial interest in the land, his expenditure, being referable to that interest, will give him no additional rights as against the reversioner or joint owner (*e*). Thus a tenant building on his landlord's property does not, except under special circumstances, acquire any right to prevent the landlord from taking possession at the end of the term; but if, being mere tenant at will, he builds in the belief that this will entitle him to a specific lease, and the landlord, knowing his error, omits to correct it, Equity will interfere to compel the grant of such a lease (*f*).

Reversioners, whether bound.

The acquiescence of a mere tenant for life, &c., cannot bind the reversioner: but it has been held that the purchaser of a reversion, buying under conditions which recognized the future user by other parties of an easement over the estate, could not afterwards dispute the right of user, although the reversioner himself had never previously recognized it (*g*).

(*a*) See *Clare Hall* v. *Harding*, 6 Ha. 297; *Crosse* v. *Revy. Co.*, 3 De G. M. & G. 712.

(*b*) See *Clare Hall* v. *Harding*, 6 Ha. 296.

(*c*) *S. C.*, *ibid.* 273.

(*d*) *Re Bright's Trusts*, 21 Beav. 430.

(*e*) *Pilling* v. *Armitage*, 12 Ves. 78; *Clare Hall* v. *Harding*, 6 Ha. 273; *Duke of Beaufort* v. *Patrick*, 17 Beav. 75.

(*f*) *Ramsden* v. *Thornton*, L. R. 1 E. & Ir. Ap. 129.

(*g*) *Duke of Beaufort* v. *Patrick*, 17 Beav. 79.

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Possession of title deeds, how far material.

The mere fact of a purchaser or mortgagee not having possession of the title deeds, will not, in the absence of other circumstances indicative of fraud, affect his legal title as against *subsequent* purchasers or incumbrancers (*h*): even the fact of a mortgagee having *returned* the deeds to the mortgagor, will not, in itself, necessarily have this effect (*i*): and the same would hold good in the case of a purchaser, if a plausible reason were given for his assenting to what would, *primâ facie*, be an unreasonable and suspicious request: but, if deeds are borrowed for a temporary purpose, they should be diligently reclaimed (*k*). If they are handed over to the mortgagor for the purpose of enabling him to mortgage for a specified amount in priority to the first mortgagees, he can fraudulently confer a good title on a mortgagee without notice, for a sum exceeding the authorized amount (*l*).

General principle as to postponement.

The true principle deducible from the authorities seems to be, that mere indiscretion or inactivity is insufficient to postpone a purchaser or mortgagee, who has the legal estate: there must, to have this effect, be an intent to facilitate a fraud, or a wilful indifference to a fraud which there was good reason to suspect was about to be committed (*m*): and the omission to make any inquiry respecting the deeds, is, in itself, evidence, though not conclusive evidence (*n*), of this wilful and fraudulent indifference (*o*): but where the contest lies between parties having mere equities, *cæteris paribus*, negligence or indiscretion in the one, may give the other, although his equity be posterior in creation, a better claim on the assistance of the Court (*p*).

(*h*) See *Evans* v. *Bicknell*, 6 Ves. 174; *Harper* v. *Faulder*, 4 Madd. 129; *Martinez* v. *Cooper*, 2 Russ. 198; *Stevens* v. *Stevens*, 2 Coll. 20; *Allen* v. *Knight*, 5 Ha. 272; affirmed 11 Jur. 527; *Farrow* v. *Rees*, 4 Beav. 21; *Finch* v. *Shaw*, 19 Beav. 500; *Colyer* v. *Finch*, 5 H. L. Ca. 905; Sug. 444; *vide suprà*, p. 414, Ch. xiv., sect. 1.

(*i*) See *Martinez* v. *Cooper*, and *Stevens* v. *Stevens*, *ubi suprà*; *Waldron* v. *Sloper*, 1 Dr. 193; *Dowle* v. *Saunders*, 2 H. & M. 242.

(*k*) *Waldron* v. *Sloper*, 1 Dr. 200.

(*l*) *Perry Herrick* v. *Attwood*, 2 De G. & Jo. 21; *Lloyd* v. *Attwood*, 3 De G. & Jo. 614; *Smith* v. *Evans*, 28 Beav. 59.

(*m*) See *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Rooper* v. *Harrison*, 2 K. & J. 105; *Dowle* v. *Saunders*, 2 H. & M. 242.

(*n*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652.

(*o*) *Hewitt* v. *Loosemore*, *suprà*.

(*p*) *Waldron* v. *Sloper*, 1 Dr. 200;

Where, in answer to a *bonâ fide* inquiry for the deeds, a reasonable excuse is given for their non-delivery, their absence does not affect a purchaser with constructive notice that they have been deposited as a security (*q*): so, where an actual memorandum of charge was accompanied by a deposit of what, although not so represented, were in fact only the earlier title deeds, the omission to call for the later deeds, which alone showed any title in the mortgagor, was held insufficient to postpone the incumbrancer to a depositee of the later deeds (*r*).

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As to custody of deeds.

It has been even held, that if the assignees of an insolvent for nineteen years omit to sell or take possession of his copyhold property, or of the copies of Court Roll, or to enter their title upon the Court Rolls, whereby the insolvent is enabled to retain the property as if owner, and mortgage it for value to a person without notice of the insolvency, this will not give the mortgagee priority to the assignees (*s*).

Assignees of insolvent, not asserting their rights for nineteen years, yet not postponed.

By the 12 & 13 Vict. c. 106 (*t*), all payments really and *bonâ fide* made to or by a bankrupt, and conveyances executed by him before the date of the fiat, or the filing of a petition for adjudication, and all contracts, dealings and transactions by and with him really and *bonâ fide* made and entered into before the date of the fiat or the filing of such petition, were protected, if the other party had no notice (*u*)

Purchaser, how far protected against vendor's assignees in bankruptcy and insolvency.

Hunter v. *Walters*, L. R. 7 Ch. Ap. 75; *Rice* v. *Rice*, 2 Dr. 83; *Layard* v. *Maud*, L. R. 4 Eq. 397; *Hunter* v. *Walters*, L. R. 11 Eq. 292; L. R. 7 Ch. Ap.; and consider the observations of Lord Cairns in *Pease* v. *Jackson*, L. R. 3 Ch. Ap. 581; see, however, *Roberts* v. *Croft*, 2 De G. & Jo. 1, and *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139, where V.-C. Giffard held that the *mere custody* of the deeds is insufficient to give priority as between equitable claimants.

(*q*) *Espin* v. *Pemberton*, 3 De G. & Jo. 547.

(*r*) *Roberts* v. *Croft*, 2 De G. & Jo. 1; and see *Thorpe* v. *Holdsworth*, L. R. 7 Eq. 139, and cases there cited.

(*s*) *Cole* v. *Coles*, 6 Ha. 517, affirmed on appeal, see p. 524.

(*t*) See sect. 133, not repealed by the Act of 1861; and see 6 Geo. IV. c. 16, s. 82; see now 32 & 33 Vict. c. 71, ss. 94, 95.

(*u*) As to which see *Willis* v. *Bank of England*, 4 A. & E. 21; *Bird* v. *Bass*, 6 Man. & G. 143; by sect. 87 notice affects corporations aggregate and companies if given to their accredited agent.

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of a prior act of bankruptcy (x). The same Act (y) also provided (z), that no person should be liable to become bankrupt by reason of any act of bankuptcy committed more than twelve months before the fiat (a), or filing of the petition; and also that no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser had notice of a prior act of bankruptcy, should be impeached by reason thereof, unless a fiat or petition for adjudication should have been sued out or filed within twelve months after such act of bankruptcy: and the "Gazette" was made conclusive evidence of the bankruptcy, unless the bankrupt proceeded to dispute the fiat or petition within twenty-one days (b) after the advertisement of the bankruptcy appeared in the "Gazette" (if he was within the United Kingdom at the date of the adjudication), or within three months (if he was then in any other part of Europe), or within twelve months (if he was then in any other part of the world) (c): and no title to any real or personal property sold under any bankruptcy, was to be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the fiat or petition for adjudication, or in any of the proceedings under the same, unless the bankrupt should, within the time allowed by the Act, have commenced proceedings to dispute, dismiss, or annul the fiat, petition, or adjudication, and have duly prosecuted the same (d). The Act also contains

(x) The validity of such payment, if made before the Act came into operation, seems to depend upon the provisions of the 6 Geo. IV. c. 16; see *Turquand* v. *Vanderplank*, 10 M. & W. 180, 194; Sug. 724; and see, as to cases within the former Act, *Shaw* v. *Batley*, 4 B. & Ad. 801; *Willis* v. *Bank of England*, 4 Ad. & E. 21; *Cannan* v. *Denew*, 10 Bing. 292, 296; *Wright* v. *Fearnley*, 5 Bing. N. C. 89, 94.

(y) Which repealed the 2 & 3 Vict. c. 29, and so much of the 2 & 3 Vict. c. 11, as related to Bankruptcy; see Schedule A.

(z) Sects. 88 and 134; not repealed by the Act of 1861.

(a) And see under the old law, 6 Geo. IV. c. 16, s. 86, *Earl Granville* v. *Danvers*, 7 Sim. 121. Fiat sent by post to district court, held to *issue* at the time of posting the letter: *Hernaman* v. *Coryton*, 5 Exch. 453.

(b) Extended to two months by the 17 & 18 Vict. c. 119, s. 24.

(c) Sect. 233.

(d) Sect. 131. It was held in *Gould* v. *Shoyer*, 6 Bing. 738, that a similar provision in the 6 Geo. IV. c. 16 (see s. 87), did not protect a purchaser, under a commission which was afterwards superseded, from the claim of the assignees under a subsequent commission.

provisions protecting, in the event of a fiat, petition, or adjudication, being superseded, annulled, or dismissed, any person who may *bonâ fide*, whether under compulsion or otherwise, and without notice of the institution of proceedings to dispute or annul such fiat, &c., have paid to the assignees any money due to the bankrupt's estate (*e*): and if, before the time had elapsed within which the bankrupt might dispute the bankruptcy, his asignees commenced any action or suit for money due to his estate, the debtor was autherized to pay the money into Court, which payment was to be valid as against the bankrupt (*f*). Where a conveyance of the bankrupt's property would require to be registered, the certificate of appointment of assignees was to be registered: and if not so registered within (as regards Great Britain and Ireland) two months from the appointment, the same was not to affect the title of a purchaser for valuable consideration, without notice, claiming under a deed registered prior to the registration of such appointment (*g*). Other Acts (*h*) contain similar provisions for the registration of the certificates of appointment of assignees of insolvents.

Under the Act of 1869.

Under the Act of 1869 (*i*) all payments, made in good faith and for value received, to any bankrupt, and all contracts or dealings with him made in good faith and for valuable consideration, by a person not having at the time of such payment, contract, or dealing, notice of any act of bankruptcy (*k*) committed by the bankrupt and available against him for adjudication, are not to be rendered invalid by the Act; and subject and without prejudice to certain provisions which we shall presently notice (*l*), any disposition, or contract with respect to the disposition, of property (*m*) by conveyance, transfer, charge, delivery of goods,

(*e*) Sect. 155.

(*f*) Sect. 158: and see 5 & 6 Vict. c. 122, ss. 24 and 25.

(*g*) Sect. 143; see 1 & 2 Will. IV. c. 56, s. 27.

(*h*) 1 & 2 Vict. c. 110, s. 46; 5 & 6 Vict. c. 116, s. 8.

(*i*) 32 & 33 Vict. c. 71, sect. 94.

(*k*) As to acts of bankruptcy, see sect. 6.

(*l*) *Vide infrà.*

(*m*) As to the meaning of the word "property," see sect. 4.

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payment of money, or otherwise made by any bankrupt, in good faith and for valuable consideration, and any execution or attachment against the land or goods of the bankrupt executed in good faith by seizure of the land, or by seizure and sale of the goods before the date of the order of adjudication, is to be valid notwithstanding any prior act of bankruptcy, if the person to or with whom such disposition or contract was made, or on whose account such execution or attachment was issued, had not at the time notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication (n). No person is to be adjudged a bankrupt on any of the grounds specified in the Act, unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before presenting the petition (o); and the bankruptcy is to have relation back to, and to commence at the time of, the act of bankruptcy on which the order of adjudication is made (p).

Doctrine of reputed ownership.

It has been decided under the former Bankruptcy Acts, that unless a purchaser or mortgagee of a reversionary interest in personalty, or of a *chose in action*, gave notice of his purchase or mortgage, he was not protected against the subsequent bankruptcy of his vendor or mortgagor, upon the ground of his having left the property within the order and disposition of the bankrupt (q); but, in order to bring a case within the operation of this rule, the property must have been left within the order and disposition of the bankrupt "with the consent of the true owner," or there must have been such laches on his part that his consent would be presumed. Thus, where a bankrupt, on the occasion of a previous insolvency, omitted from his schedule an equitable reversionary interest to which he was entitled, and it did not appear that the assignee in insolvency was

(n) Sect. 95.

(o) Sect. 6; which also see as to who may present the petition.

(p) Sect. 11; which also see as to the commencement of bankruptcy, where there are more acts of bankruptcy than one.

(q) *Bartlett* v. *Bartlett*, 1 De G. & Jo. 130; *Ex parte Boulton*, *ibid.*, 163; *Day* v. *Day*, *ibid.*, 144. See too, *Thompson* v. *Tomkins*, 8 Jur. N. S. 185; *Rickards* v. *Gledstanes*, 3 Giff. 298; see 12 & 13 Vict. c. 106, s. 125.

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aware of the fact, or that he had been guilty of any laches, the assignee in insolvency was held entitled to it as against the assignee in bankruptcy, notwithstanding that no notice of the insolvency had been given to the trustees in whom the property was vested (*r*). In one case, where one of two partners allowed the other to carry on the business ostensibly as his own, it was held, on the bankruptcy of the latter, that the share of the dormant partner in the stock in trade did not, according to the doctrine of reputed ownership, vest in the assignees: the decision of a majority of the judges being rested on the ground that, in order to bring a case within the operation of the rule, the bankrupt must be one person and the true owner another; whereas in a partnership there is a community of property in the goods (*s*).

Under Act of 1869.

Under the Act of 1869 (*t*), the property of the bankrupt, divisible among his creditors, is to include all goods and chattels which, at the commencement of the bankruptcy, are in his possession, order or disposition, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; but this provision is expressly confined to the case of a trader, and is not to extend to *choses in action*, other than debts due to him in the course of his business.

Purchaser of equitable interest, when protected against prior insolvency or bankruptcy.

It has been decided by Lord St. Leonards, that the title of an assignee for value of an equitable *chose in action*, who buys without notice of a prior insolvency, and is first to give notice of his claim to the trustee of the fund, is good as against the assignee in the insolvency (*u*); and assignees in bankruptcy, omitting to give such notice, have been postponed to a subsequent purchaser for value, who

(*r*) *Re Rawbone*, 3 K. & Jo. 476.

(*s*) *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474; but see *Coldwell* v. *Gregory*, 1 Price, 119, where the private property of one partner which had been used as if it were partnership property, was held to pass to the assignees of the joint estate, as in the order and disposition of the firm.

(*t*) 32 & 33 Vict. c. 71, sect. 15.

(*u*) *Re Atkinson*, 2 De G. M. & G. 140.

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gave due notice of his assignment (*x*). And although express actual notice is not absolutely necessary, yet it ought in every case to be given. Thus, where a trustee acquired his sole information of his *cestui que trust's* insolvency by reading an advertisement, it was at first held that a subsequent inqumbrancer, who gave formal notice to the trustee, thereby acquired priority over the assignee in insolvency (*y*); but, on appeal, this decision was reversed (*z*). Upon the same principle, the title of a *bonâ fide* purchaser of an equitable interest in land, buying without notice of the vendor's bankruptcy, and subsequently getting in the legal estate, would, it is conceived, be good as against the trustee in bankruptcy.

In case of conveyance to creditor for value;

A conveyance to a creditor, for a valuable consideration sufficiently strong in itself to influence the debtor to make it, was held not to be "voluntary" within the meaning of the Insolvent Acts, although the consideration consisted in part of a pre-existing debt (*a*).

or against his judgment creditors;

We have already taken a general view of the law relating to judgments; and have adverted to the 2 & 3 Vict. c. 11, which preserves to *bonâ fide* purchasers without notice (*b*), all those means of defence which were available before the passing of the 1 & 2 Vict. c. 110; and to the 3 & 4 Vict. c. 82, which, in effect, provides that notice of an unregistered judgment shall not subject a purchaser to the extended remedies given to a creditor by the 1 & 2 Vict. c. 110; also to the provisions of the 18 & 19 Vict. c. 15; and to the 23 & 24 Vict. c. 38, which provides that no judgment shall affect land as to a *bonâ fide* purchaser or mortgagee, even with notice, unless a writ of execution has been issued and

(*x*) *Bartlett* v. *Bartlett*, 1 De G. & Jo. 130; *Ex parte Boulton*, *ib.* 163; *Day* v. *Day*, *ib.* 144; *Rickards* v. *Gledstanes*, 3 Giff. 298; *Thompson* v. *Tomkins*, 8 Jur. N. S. 185.

(*y*) *Lloyd* v. *Banks*, L. R. 4 Eq. 222; *Re Brown's Trusts*, L. R. 5 Eq. 88.

(*z*) *Lloyd* v. *Banks*, L. R. 3 Ch. Ap. 488, and *vide infrà*.

(*a*) *Margerson* v. *Saxton*, 1 Y. & C. 525; see *Stuckey* v. *Drewe*, 2 M. & K. 190; *Arnell* v. *Bean*, 8 Bing. 87.

(*b*) As to Palatinate judgments, *vide suprà*, p. 486.

registered, and put in force within three months from registration (c); and to the 27 & 28 Vict. c. 112.

It may be further remarked, that an equitable incumbrancer or purchaser will, in Equity, be protected against a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an *elegit*, without notice of the mortgage or purchase (d): but, as we have seen, the purchaser, after notice of the subsequent judgment having become a charge on the land, could not, without the consent of the creditor, safely pay to the vendor any part of the purchase-money which happened to remain unpaid.

or against defects in fines or recoveries.

The 14 Geo. II. c. 20, and the 3 & 4 Will. IV. c. 74 (e), contain provisions for giving, in certain specified cases, validity to defective fines and recoveries, either generally, or as in favour of purchasers: and the 5 Vict. c. 32 (f), contains provisions for giving, in certain specified cases, validity to fines and recoveries levied and suffered in the now abolished Courts of Great Session in Wales; and of Session in Cheshire; and the 11 & 12 Vict. c. 70, supplies the want of proclamations, as respects fines levied at Westminster (g). The 11 Geo. IV. & 1 Will. IV. c. 38, s. 7, sets up previous conveyances which have been made by any provisional assignee in insolvency to the creditor's assignee by order of the court (h). The 54 Geo. III. c. 173 (i), and the 57 Geo. III. c. 100 (k), contain provisions for confirming,

Title in insolvency.

Error in sales of land tax.

(c) *Vide suprà*, p. 484, *et seq.* The 27 & 28 Vict. c. 112, by providing that a judgment shall not affect land, until it has been actually delivered in execution, has, in the case of judgments entered up after the passing of the Act, rendered the question of notice immaterial.

(d) See *Whitworth* v. *Gaugain*, 1 Ph. 728; and cases there cited; see too, *Cooke* v. *Wilton*, 29 Beav. 100; *Eyre* v. *M'Dowell*, 9 H.-L. C. 620.

(e) See sects. from 4 to 12; see *Wickens* v. *Windsis*, 14 Jur. 836, V.-C. P.; *Lockington* v. *Shipley*, 1 Bing. N. C. 355; *Totton* v. *Vincent*, 5 Bing. N. C. 626; *Nicholas* v. *Davies*, 17 L. T. 64.

(f) See sects. 2 and 3; *Doe* v. *Price*, 16 M. & W. 603.

(g) Sect. 1; see sect. 3.

(h) See *Doe* v. *Story*, 7 Ad. & E. 909.

(i) See sect. 12.

(k) See sects. from 22 to 26; *Doe* v. *Phillips*, 1 Q. B. 84; 4 Per. & Dav. 562; and see as to sales by rector for redemption of land-tax, *Doe* v. *Woodward*, 1 Exch. 273; *Beaden* v. *King*, 9 Ha. 499. As to merger of land-tax, *vide suprà*.

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Inclosure.

Lis pendens.

Crown debts.

in certain specified cases, defective titles to land tax. The 3 & 4 Will. IV. c. 87, remedies defective titles under Inclosure Acts in specified cases. By the 2 Vict. c. 11, purchasers, without express notice, are protected against future obligations to the Crown, and against any *lis pendens*, unless the same respectively are registered as directed by the Act; and there must be re-registry every five years (*l*); and the 18 & 19 Vict. c. 15, s. 13, protects purchasers claiming under paid-off mortgagees, against the obligations of such mortgagees to the Crown. By the 48 Geo. III. c. 47, defective titles in Ireland are, in the cases therein specified, rendered valid as against the Crown.

Succession duty.

Sales by commissioners of Woods and Forests.

The 16 & 17 Vict. c. 51, s. 52, protects *bonâ fide* purchasers, in certain cases, against claims by the Crown in respect to succession duty. And the 10 Geo. IV. c. 50, contains provisions (ss. 46 and 73) for the protection of parties taking conveyances or leases from the Commissioners of Woods and Forests; and the 26 & 27 Vict. c. 43, contains similar provisions on any sale, exchange, or lease of land by the Postmaster-General. So, on the sale of land forming part of the possessions of the Duchy of Cornwall, purchasers are expressly exempted from the necessity of seeing that the provisions of the Duchy Management Act have been complied with (*m*).

Section 4.

As to priority under the Registration Acts.

Or against unregistered deeds in register countries.

(4) *As to priority under the Registration Acts.*

The existing Local Registry Acts (*n*) purport to render any deed affecting either the legal or equitable estate, void as against a purchaser or mortgagee claiming under an instrument of an earlier date of registration. At Law, notwithstanding notice, mere priority of registration absolutely determines the right to the property as between parties claiming under adverse registered instruments purporting to pass the legal

(*l*) *Vide suprà*, p. 496.

(*m*) See 26 & 27 Vict. c. 49, s. 19.

(*n*) West Riding, 5 Anne, c. 18, and 6 Anne, c. 35; East R. and Kingston-on-Hull, 6 Anne, c. 35; North R., 8 Geo. II., c. 6; Middlesex, 7 Anne, c. 20; see Report on the Middlesex Registry of the Land Transfer Commission, 1870.

estate (o): but, in Equity, registration is no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security (p): and his assignee for value and without notice, is in no better position, if the interest assured be merely equitable, and he do not get in the legal estate (q): nor does registration of an equitable incumbrance prevent the person who then has, or subsequently acquires, the legal estate, from using it for the protection of any equitable interest which he may acquire in the property without notice of the registered incumbrance (r): and it has been held that a purchaser advancing his money and taking a conveyance without notice of a prior deed unregistered (s), or which has been imperfectly registered, may, upon acquiring notice of it, register his own deed, and so gain priority (t); but, if at the time when he registers his deed, he has notice of a prior unregistered deed or incumbrance, he does not, by such registration, acquire priority in a Court of Equity (u)

Prior registration conclusive at Law but not in Equity.

But it is only by actual notice clearly proved that a registered deed will be postponed to a prior unregistered instrument (x); and although in many cases notice to the solicitor or agent has been held sufficient to bind the client or principal (y), yet even in such cases the notice should be

(o) *Doe* v. *Allsop*, 5 B. & Al. 142.

(p) *Cheval* v. *Nichols*, Stra. 664; *Le Neve* v. *Le Neve*, 3 Atk. 646; see p. 651; *Sheldon* v. *Cox*, Amb. 624; *Tunstall* v. *Trappes*, *Gosling's case*, 3 Sim. 301; and see *Jolland* v. *Stainbridge*, 3 Ves. 478; *Davies* v. *Earl of Strathmore*, 16 Ves. 419.

(q) See *Ford* v. *White*, 16 Beav. 120.

(r) See *Morecock* v. *Dickins*, Amb. 678; *Bedford* v. *Bacchus*, *ibid.* 680, cited, *Wrightson* v. *Hudson*, 2 Eq. Ca. Abr. 609; *contrà*, in Ireland, *Hill* v. *Mill*, 12 Ir. Eq. R. 107, 3 H. L. C. 828; see and consider *Re Russell Road Purchase Monies*, L. R. 12 Eq. 78.

(s) *Elsey* v. *Lutyens*, 8 Hare, 159.

(t) *Essex* v. *Baugh*, 1 Y. & C. C. C. 620.

(u) See *Lee* v. *Green*, 6 De G. M. & G. 155; *Benham* v. *Keane*, 1 J. & H. 685; affd. 3 De G. F. & J. 318; and *vide suprà*, p. 481.

(x) *Wyatt* v. *Barwell*, 19 Ves. 435; and see judgment of Lord Chancellor Sugden in *Majoribanks* v. *Hovenden*, Dru. Ch. Rep. temp. Sug. 11, 22.

(y) See *Le Neve* v. *Le Neve*, 3 Atk. 646; *Sheldon* v. *Cox*, Amb. 624; *Nixon* v. *Hamilton*, 2 Dr. & Wal. 364; *Lenehan* v. *M'Cabe*, 2 Ir. Eq. R. 342.

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direct, and not constructive merely (z). In one case the omission of a solicitor, when preparing a marriage settlement of land in Middlesex to examine the earlier title, was treated as constructive notice of a prior unregistered equitable change; and the settlement, although registered without any actual notice of the charge, was postponed to it (a): but in a recent case under the Irish Act, the House of Lords expressly disapproved of this decision, and held that the mere omission on the part of a solicitor, when preparing a legal mortgage of land in Ireland to require production of the title deeds, for the non-production of which a reasonable excuse was given, did not postpone the legal mortgage, which was duly registered, to a prior unregistered equitable charge (b).

Priorities *inter se* of judgments on local register.

As respects land situate in a register county, the priorities of judgments *inter se* depend on the order of their registration in the local register (c).

Where deeds are registered at the same time.

Where two deeds are registered on the same day, and at the same hour, the document denoted by the earlier number will be presumed to have been first registered (d).

Notice immaterial under Ship Registry Acts.

Under the earlier Ship Registry Acts, notice was immaterial; and the registered title always prevailed, except perhaps in cases of positive fraud (e). In one case falling under the Merchant Shipping Act, 1854 (f), it was doubted by V.-C. Wood whether the Court could recognise equitable rights as against the registered owner (g); and, in a later

(z) See *Majoribanks* v. *Hovenden*, *ubi suprà*; *Ratcliffe* v. *Barnard*, L.R. 6 Ch. Ap. 652.

(a) *Wormald* v. *Maitland*, 35 L. J. (Ch.) 69.

(b) *Agra Bank* v. *Barry*, L. R. 7 E. & Ir. Ap. 135, and see cases there cited, and *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652.

(c) *Neve* v. *Flood*, 33 Beav. 666; and see *Benham* v. *Keane*, *ubi suprà*; *Westbrooke* v. *Blythe*, 3 Ell. & B. 737; *Hughes* v. *Lumley*, 4 Ell. & B. 685.

(d) *Neve* v. *Pennell*, 2 H. & M. 170.

(e) *M'Calmont* v. *Rankin*, 2 De G. M. & G. 403; *Coombes* v. *Mansfield*, 3 Dre. 193.

(f) 17 & 18 Vict. c. 104.

(g) *European, &c. Royal Mail Co.* v. *Royal Mail, &c. Co.*, 4 K. & J. 676; 5 Jur. N. S. 810; see too *Orr* v. *Dickinson*, 1 Johns. 1.

case (*h*), an equitable mortgage of a ship was declared invalid, as being contrary to the scope and intention of the Act. But by the Amending Act passed in 1862 (*i*), it was enacted that without prejudice to the provisions contained in the principal Act for preventing notice of trusts being entered in the Register Book or received by the Registrar, and without prejudice to the powers of disposition, and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions which exclude unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same manner as equities may be enforced against them in respect of any other personal property.

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Under Merchant shipping Act, 1854.

By sect. 70 of the Merchant Shipping Act, 1854, a mortgagee is not to be deemed the owner, except so far as may be necessary for the purposes of his security: in one case, where a ship was seized by a judgment creditor, after a mortgage has been registered, but not indorsed on the certificate of the ship's register, it was held that the property in the ship was vested in the mortgagee; and he was protected against the claims of the judgment creditor (*k*).

Purchaser's title, how impeachable under Register Acts.

It may be laid down, as a general rule, that a purchaser can be evicted under the Registration Acts, only by a person claiming under an instrument executed by the party under whom the two adverse titles are derived or parties taking under him by act in Law, and whose conveyance is registered prior to the registration of the document which forms the root of the purchaser's adverse title. For instance, if A. convey first to B. who does not register, and then to C. who

(*h*) *Liverpool Bank* v. *Turner*, 2 De G. F. & Jo. 502; 1 J. & H. 159; as to the rights of parties interested in a foreign ship purchased in this country, see *Hooper* v. *Gumm*, L. R. 2 Ch. Ap. 282; as to the relative rights of first and second mortgagees of a ship in respect of the freight, see *Liverpool Marine Credit Co.* v. *Wilson*, L. R. 7 Ch. Ap. 507.

(*i*) 25 & 26 Vict. c. 63, sect. 3. The later Acts are 34 & 35 Vict. c. 110; 36 & 37 Vict. c. 85.

(*k*) *Kitchin* v. *Irving*, 5 Jur. N. S. 118.

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does not register, and then C. convey to D. who registers, D. acquires no title against B. unless he can procure a conveyance from A. to C. to be duly registered (*l*); which would, it is conceived, be impracticable if A. and the witnesses attesting his execution of his original conveyance to C. were dead (*m*): so, where a lease is unregistered, no statutory title is acquired against the owner of the reversion by registering an assignment of the lease (*n*): but if A. (a woman), after conveying to B., marry, and her husband convey the estate which he takes *in jure mariti* to C., who registers before B.'s conveyance is registered, C. thereby acquires priority (as intimated by the terms of the above proposition) (*o*): and the same rule would, it appears, prevail, if A., after conveying to B., were to die intestate, and her heir-at-law were to convey to C., who were to register before any registration by B (*p*).

So, if A. convey to B., who does not register, and then B. convey to D., who registers merely his own conveyance, and then A. convey to C., who registers, D., it is conceived, has no title as against C. and parties claiming under him: for the registered conveyance to C. displaces B.'s title under his unregistered conveyance; and this being gone, the conveyance to D. goes with it: and, in such a case, a person searching the register could not search as to B., and would have no reason to suppose that the property conveyed by B. to D. had ever been held by A.: nor, as respects parties claiming under C., would it make any difference that the assurances by C. were unregistered (*q*). But the case would probably be different if A. were made a party to the conveyance from B. to D. (*r*). We have already referred to the

(*l*) *Jack* v. *Armstrong*, 1 Hud. & Bro. 727; *Fury* v. *Smith*, *ib.* 735.

(*m*) *S. C.*, and *Essex* v. *Baugh*, 1 Y. & C. C. C. 620; *vide suprà*, pp. 684, 685, as to the necessity for the memorial being attested by a witness to the execution of the deed by the grantor.

(*n*) *Honeycomb* v. *Waldron*, 2 Stra. 1064; and see *Battersby* v. *Rockfort*, 2 J. & L. 431.

(*o*) See *Warburton* v. *Loveland*, 2 Dow. & C. 480.

(*p*) See *S. C.*

(*q*) See *S. C.*

(*r*) See *Hunter* v. *Kennedy*, Ir. Ch. R. 148, M. R.; affd. 1 Ir. Ch. R. 225.

37 & 38 Vict. c. 78, which provides (*s*) that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or some one deriving title under him shall, if registered before, take precedence of, and prevail over, any assurance from the testator's heir-at-law (*t*).

Priorities under Fines and Recoveries Abolition Act.

We have also referred to the provisions in the 3 & 4 Will. IV. c. 74, as to the priorities of parties claiming under disentailing assurances, both of freeholds and copyholds (*u*).

Section 5.

As to notice, &c.

(5.) *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates and voluntary or fraudulent conveyances—equitable relief against purchaser with notice.*

Purchaser only affected by actual notice of unregistered assurance or judgment.

Notice of an unregistered security must, in order to affect a purchaser claiming under a registered instrument, be actual notice affecting him with fraud, if he disregard it (*x*): so, also, notice of an unregistered judgment must, it would seem, be actual in order to affect a purchaser (*y*).

As to notice to trustees.

Notice to one of several trustees is, as a general rule, notice to all (*z*): but not where the trustee, to whom alone

(*s*) See sect. 8.

(*t*) See before the Act, *Chadwick* v. *Turner*, L. R. 1 Ch. Ap. 310; 34 Beav. 634; and *vide suprà*, p. 682.

(*u*) *Vide suprà*, p. 688, *et seq.* We may remark here that the consequence of avoiding an unregistered bill of sale by execution is not merely to neutralize it, so far as the execution creditor is concerned, but to displace it altogether; *Richards* v. *James*, L. R. 2 Q. B. 285; *Hue* v. *French*, 26 L. J. Ch. 317.

(*x*) See *Hine* v. *Dodd*, 2 Atk. 275; *Jolland* v. *Stainbridge*, 3 Ves. 478, 486; *Wyatt* v. *Barwell*, 19 Ves. 435; *Buckley* v. *Lanauze*, Ll. & G. Rep t. Pl. 327, 341; *Nixon* v. *Hamilton*, 2 Dru. & Wal. 364, 388; *Wallace* v. *Marq. of Donegal*, 1 Dru. & Wal. 461, 488; and see judgment of Lord Chancellor Sugden in *Majoribanks* v. *Hovenden*, Dru. Ch. Rep. temp. Sugd. 11, 22; *Rolland* v. *Hart*, L. R. 6 Ch. Ap. 678, 681.

(*y*) See *Tunstall* v. *Trappes*, *Gosling's case*, 3 Sim. 301; and see *Benham* v. *Keane*, 1 J. & H. 685, 704; 3 De G. F. & Jo. 318.

(*z*) *Ex parte Rogers*, 8 De G. M. & G. 271; *Willes* v. *Greenhill*, 29 Beav. 387; 4 De G. F. & G. 147; and see *Wise* v. *Wise*, 2 J. & L. 412.

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notice is given, has an interest adverse to that of his co-trustees; as, *e.g.*, where he has a beneficial interest which he has secretly incumbered (*a*). So, where one of several executors took an assignment from a *cestui que trust* of his expectant share in a residue, without disclosing the circumstance to his co-executors, a subsequent purchaser of the same share, who gave due notice to the surviving executor, was held entitled to priority (*b*). Where notice of a charge is duly given to the trustees for the time being, and afterwards other trustees are appointed in their place, who, without notice of the charge, distribute the fund among the beneficiaries, the new trustees are not liable, as for a misapplication of the fund, on the ground that on their acceptance of office they ought to have inquired whether notice of any charge had been given (*c*).

Notice to solicitor is notice to client.

Actual notice to the solicitor of the trustees, or to the solicitor, or agent in the transaction, is actual notice to all the trustees, or the client or principal (*d*): but notice to the solicitor is not notice to the client, when the person giving the information knows, or has good reason to believe, that it will not be communicated to the client (*e*). Where the principal is affected with personal knowledge, it is, of course, immaterial whether he acquired it in one or another character (*f*).

Actual notice, when, by whom, and how to be given.

Actual notice, according to Lord St. Leonards (*g*), "must be given by a party interested in the property (*h*), and in the course of the treaty for the purchase:" and he also cites

(*a*) *Brown* v. *Savage*, 4 Drew. 635; *Willes* v. *Greenhill* (No. 1), 29 Beav. 376; *S. C.* (No. 2), *ib.* 391.

(*b*) *Timson* v. *Ramsbottom*, 2 Keen, 35.

(*c*) *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80.

(*d*) *Willes* v. *Greenhill*, *ubi suprà*; *Rickards* v. *Gledstanes*, 8 Jur. N. S. 455; and see *Tunstall* v. *Trappes*, *Godwin's case*, *ubi suprà*, and *Le Neve* v. *Le Neve*, 3 Atk. 646; 2 Wh. & T. L. C. 35; and see *Davis* v. *Earl of Strathmore*, 16 Ves. 419; *Sheldon* v. *Cox*, 2 Eden. 224; *Nixon* v. *Hamilton*, 2 Dru. & Wal. 391, 393; *Rolland* v. *Hart*, L. R. 6 Ch. Ap. 678.

(*e*) *Sharpe* v. *Foy*, L. R. 4 Ch. Ap. 35; and see *Agra Bank* v. *Barry*, L. R. 7 E. & I. Ap. 135.

(*f*) See *Meux* v. *Bell*, 1 Ha. 88.

(*g*) Sug. 755; and see 1 J. & L. 442.

(*h*) See *Wildgoose* v. *Wayland*, Gouldsb. 147.

a remark made by the Master of the Rolls, in *Jolland* v. *Stainbridge* (*i*), intimating a doubt whether a general notice of title is sufficient, and whether it is not necessary to specify the instrument under which the claimant is entitled.

General remarks on the doctrine.

Perhaps all these points should be cautiously acted on in practice (*k*). It is one thing to say that mere "flying reports" (*l*) are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim, unless made by a party interested. The credibility of the informant must surely be considered (*m*). Nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the Court should not consider whether, (as in the case of an agent or solicitor,) such notice must not have been present to his mind during the treaty. Of the case cited by Lord St. Leonards in support of the unqualified proposition (*n*) it may be remarked, that considering its date (*o*), and the cautious character of the Judge, (Lord Keeper Coventry,) an unwillingness to do anything which might be construed as a breach of parliamentary privilege may have influenced the decision: which was, that a member of the House of Commons was not to be considered as affected with notice of what came to his knowledge as parliamentary business within the walls of the House. But general reputation cannot be constructive notice of any fact in proof of which such reputation would be inadmissible in evidence (*p*).

So, the doctrine hinted at in *Jolland* v. *Stainbridge* seems to be at variance with a later case, where it was held that a purchaser, having notice that A. had a judgment or warrant of attorney affecting the estate, was bound in Equity,

(*i*) 3 Ves.; see p. 486.

(*k*) See, as to the first and third, *Butcher* v. *Stapely*, 1 Vern. 363; and *Fry* v. *Porter*, 1 Mod. 311.

(*l*) Goulds. 147.

(*m*) But see *Barnhart* v. *Greenshields*, 2 Eq. R. 1217; P. C., recognising the rule.

(*n*) *East Grinsted case*, Duke's Charitable Uses, 640.

(*o*) A.D. 1633.

(*p*) *Greenslade* v. *Dare*, 1 Jur. N. S. 294; 20 Beav. 284.

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although the incumbrance was in fact a mortgage (q): so, a general recital in a deed that there were mortgages on the estate, has been held, by Lord Langdale, to amount to notice of a mortgage not specified in such deed (r): but where two charges were contained in one deed, and one only was specified in the notice, this was held not to be notice of the other (s).

In one case (t), where a trustee had only indirect notice of his *cestui que trust's* insolvency, the assignee, having omitted to give formal notice, was postponed to a subsequent incumbrancer, who gave due notice of his claim; but, on appeal, this decision was reversed as inconsistent with the established principles of the Court; and it was laid down by Lord Cairns that if the trustee can be shown to have in any way acquired a knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge so acquired, then there is fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way which would be inconsistent with the claim of the incumbrancer (u).

Purchaser, whether affected by notice of construction of doubtful instrument.

It seems probable that a purchaser having notice of an executory instrument—(*e. g.*, marriage articles,)—of doubtful meaning, would, as a general rule, be bound to take notice of the construction which would be put upon it by a Court of Equity; and must, therefore, see, that any instrument which may have been executed in pursuance thereof, and which is material to the title, has been framed in accordance with such construction (x): but, where a long period has elapsed since the sale, the Court may decline to fix upon a purchaser

(q) *Taylor* v. *Baker*, 5 Pri. 306; and see 1 Ha. 58.

(r) *Farrow* v. *Rees*, 4 Beav. 18; and see *Lacey* v. *Ingle*, 2 Ph. 413; *Gibson* v. *Ingo*, 6 Ha. 124.

(s) *Re Bright's Trusts*, 21 Beav. 430; *vide infrà*, pp. 861, 876.

(t) *Lloyd* v. *Banks*, L. R. 4 Eq. 222, M. R.; and see *Re Brown's Trusts*, 5 Eq. 88, V.-C. M.

(u) *Lloyd* v. *Banks*, L. R. 3 Ch. Ap. 488.

(x) See Sug. 781; *Davies* v. *Davies*, 4 Beav. 54.

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a difficult construction of a doubtful instrument, although it might have granted relief as between the parties thereto if there had been no sale (*y*).

Constructive notice—nature of.

Constructive notice, (which, in its general effects, is similar to actual notice (*z*),) has been defined to be, "evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted" (*a*). This, perhaps, scarcely conveys a satisfactory notion of the nature of the doctrine; the reported decisions upon which clearly show, that constructive notice is often held to exist in the absence of any idea by the Court of the existence of actual personal knowledge. If, for instance, a purchaser, having notice of a deed as being one which affects the property, is induced to rely upon the vendor's representation of its contents, the Court may hold him bound by those contents, even although it were satisfactorily shown from the nature of the transaction that he placed implicit and *bonâ fide* confidence in the good faith of the vendor (*b*); and in such a case it will not merely fix him with notice of the contents, whether the deed is produced or not, but also with notice of everything which might reasonably be learnt from requiring production of the deed, as, *e.g.*, that it had been deposited as a security (*c*). So in *Jackson* v. *Rowe* (*d*), Sir John Leach, M. R., says, "Although he, (the purchaser,) may, in fact, have been ignorant of the settlement, yet, in Equity, he must be fixed with all the knowledge which it was reasonable he should acquire." Constructive notice may, perhaps, be rather considered to consist in those circumstances under which the Court concludes, either that the party, (personally or through his agent,) has fraudulently abstained from acquiring actual notice, or has been guilty

(*y*) *Thompson* v. *Simpson*, 1 Dru. & W. 459.

(*z*) *Sheldon* v. *Cox*, Amb. 626.

(*a*) 2 Anstr. 438; and see Sug. 755.

(*b*) See 1 Ph. 253; see *Re Bright's Trusts*, 21 Beav. 430, where notice of a deed accompanied by an erroneous statement of its contents was held not to be sufficient notice.

(*c*) *Peto* v. *Hammond*, 30 Beav. 495; 8 Jur. N. S. 550; and *vide infrà*, p. 875.

(*d*) 2 Sim. & St. 475; and see *Espin* v. *Pemberton*, 3 De G. & J. 547, 554.

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of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud; and which, therefore, the common interests of society require should, in its consequences, be treated as equivalent to actual notice. What degree of negligence is sufficient for this purpose remains to be considered.

Propositions of Wigram, V.-C., as to constructive notice,

In a case, before V.-C. Wigram, it was asserted by the Court, that the cases in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the Court has, thereupon, bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the Court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiry, for the very purpose of avoiding notice (*e*); and is therefore guilty of wilful ignorance, which is not to be distinguished in its equitable consequences from actual knowledge (*f*). And, in a later case, the V.-C., with reference to his previous judgment, repudiates the notion, (which had been attributed to him,) "that there may not be a degree of negligence so gross that a Court of Equity may treat it as evidence of fraud—impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent;" and further remarks, "Negligence, as I understand the term, supposes a disregard of some fact known to the purchaser, which, at least, indicated the existence of that fact, notice of which the Court imputes to the purchaser (*g*).

(*e*) *Jones* v. *Smith*, 1 Ha.; see p. 55; and see *Agra Bank* v. *Barry*, L. R. 7 E. & I. Ap. 135, 146.

(*f*) *Owen* v. *Homan*, 17 Jur. 861.

(*g*) *West* v. *Reid*, 2 Ha. 257, 259.

are capable of extension—*semble.*

Mere negligence may have the effect of notice.

The propositions of the V.-C. seem, however, scarcely to provide for those cases in which a purchaser is affected with constructive notice, not through his personal knowledge of any fact leading him to actual notice, but by his neglect of the usual and recognised means for acquiring such knowledge or notice (*h*). For instance, a public Act of Parliament is notice to all the world (*i*): so is a *lis pendens* (*k*), if registered under the Act of 2 Vict. c. 11 (*l*); or a deed or will registered in a registered county or entered on Court Rolls (if the purchaser search over the period within which the instrument is registered (*m*) or the entry is made); or a judgment entered at the Common Pleas, if the purchaser search the register: so, if a person being referred for information to another, neglect to apply to him, he will be held to have had notice of what he might have learnt on inquiry (*n*): so, if a purchaser, without any fraudulent intention (*o*), (the absence of which might be evidenced by his payment of a full price for the property,) were to accept a conveyance

(*h*) See *Ware* v. *Lord Egmont*, 22 L. T. 210; 18 Jur. 371; 3 Eq. R. 1; 4 De G. M. & G. 460; *Jones* v. *Williams*, 24 Beav. 47; *Boursot* v. *Savage*, L. R. 2 Eq. 134.

(*i*) Sug. 758; although it be a local Act, *Barraud* v. *Archer*, 2 Sim. 433; *S.C.*, 2 Russ. & M. 751. *Quære*, as to a private Act made public; Sug. *ubi suprà.*

(*k*) *Ibid.* Whether it is actual notice, so as to prevail against a registered instrument, *quære; Wallace* v. *Marquis of Donegal*, 1 Dru. & Wal. 461, 488.

(*l*) See sect. 7. But it is said to be only notice of what is charged on the bill, and not of equities which may possibly arise out of the matters in question in the suit; see *Shallcross* v. *Dixon*, 5 Jarm. Conv. by S. 493; *Bull* v. *Hutchins*, 9 Jur. N. S. 954; see as to Ireland, 7 & 8 Vict. c. 90; *Jennings* v. *Bond*, 2 J. & L. 720, *et quære.* A special case filed under the 13 & 14 Vict. c. 35, is a *lis pendens* (sect. 17); so is an administration suit, as respects estates sold under the decree, *Drew* v. *Earl of Norbury*, 3 J. & L. 267: filing of the bill and not service of the subpœna, is the commencement of a *lis pendens*, *S. C.* A petition for winding up a public company under the Act of 1862 was, by the 114th section, made a *lis pendens*; which, however, only affected the company in its corporate character, and not the individual contributories; see *Ex parte Thornton*, L. R. 2 Ch. Ap. 171: but this section has been recently repealed; see 30 & 31 Vict. c. 47. As to the doctrine of *lis pendens* being notice, see *Bellamy* v. *Sabine*, 1 De G. & Jo. 566, and *infrà*, p. 872.

(*m*) *Hodgson* v. *Dean*, 2 Sim. & St. 221; see, as to the extent to which a memorial is notice, *Rochard* v. *Fulton*, 1 J. & L. 413.

(*n*) *Wason* v. *Waring*, 15 Beav. 151.

(*o*) See *Proctor* v. *Cooper*, 2 Dre. 1; affd. 1 Jur. N. S. 149.

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without any previous investigation of title, relying on the mere assurance of the vendor that he was absolute owner, he would, nevertheless, be held to have constructive notice of any defect appearing on the title (*p*); although he could be scarcely said to have actual notice of any fact indicating the existence of such defect.

Purchaser having notice of a particular fact or instrument held to have notice of connected facts and instruments.

To consider, however, the cases falling within the rules laid down by V.-C. Wigram, and which, with the above exceptions, seem to comprise the authorities on the subject. It has been held, that notice of a postnuptial, and apparently voluntary, settlement is constructive notice of the antenuptial agreement on which it is founded (*q*): that actual notice to a purchaser, of an instrument as one affecting the estate, is constructive notice of all instruments to which an examination of the first would have led him (*r*); even although such prior instruments are not actually recited, but there is only a recital that the property is subject to limitations which in fact correspond with the limitations thereby created (*s*): that actual notice of a deed is constructive notice of everything which might be learnt from requiring its production,—as, *e.g.*, that it was deposited as a security (*t*):—and that notice of a prior conveyance, and of the then vendor's title, is notice of his lien for unpaid purchase-money (*u*): so, an inaccurate recital of a will has been held to be notice of its real contents (*x*). It has even

(*p*) See Lord Lyndhurst's remarks on *Jackson* v. *Rowe*, in 1 Ph. 255; and see to the same effect Sir J. Wigram's remarks in *Neesom* v. *Clarkson*, 2 Ha. 173, and *West* v. *Reid*, 2 Ha. 260; but see and consider *Agra Bank* v. *Barry*, L. R. 7 E. & Ir. Ap. 135; and *vide infrà*, where the effect of the non-production of title deeds as respects the doctrine of constructive notice is more fully considered.

(*q*) *Ferrars* v. *Cherry*, 2 Vern. 384; as to the authority of the case which has been questioned, see Mr. Raithby's note, 3rd edit.

(*r*) *Coppin* v. *Fernyhough*, 2 Bro. C. C. 291; *Bisco* v. *Earl of Banbury*, 1 Ca. in Chan. 287, 291; *Tanner* v. *Florence*, *ibid.* 259, 260.

(*s*) *Neesom* v. *Clarkson*, 2 Ha. 163; see p. 165.

(*t*) *Peto* v. *Hammond*, 30 Beav. 495; 8 Jur. N. S. 550.

(*u*) *Davies* v. *Thomas*, 2 Y. & C. 234. See *Cator* v. *Earl of Pembroke*, 1 Bro. C. C. 301, 302; Sug. 553; and *Butler* v. *Lord Portarlington*, 1 Dru. & W. 20; *Att.-Gen.* v. *Hall*, 16 Beav. 388; and see cases cited, *suprà*, n. (*p*).

(*x*) *Hope* v. *Liddell*, 21 Beav. 183.

been held that a recital that the property was held upon such trusts for the use of A., B., and C. (parties to the conveyance) "for such estates in possession, reversion, or remainder as they became entitled to after the death of D.," was notice of *prior* trusts in favour of other parties, which would have been discovered by an examination of the instrument creating the trusts which were referred to in the recital (*y*): this, however, seems to be an improper extension of the ordinary doctrine. As observed by Mr. Pepys (Lord Cottenham), *arguendo* for the purchaser, "notice of the existence of a trust for A. cannot impose on a purchaser an obligation to inquire whether there is not also a trust for B." So, notice of an equitable claim, as affecting an unspecified portion of the property, is notice of the claim as in fact affecting the entirety (*z*).

So, a purchaser of a house has been held to have notice of an agreement to grant a smoke easement to an adjoining owner, from the mere fact of there being fourteen chimney pots on the top of the chimney-stack, and only twelve flues in the house (*a*).

Notice from physical condition of the property at time of sale.

So, if the condition of the property at the date of the contract is such as to suggest inquiry, the purchaser may be fixed with constructive notice of rights of way, or other easements affecting it: thus, where A. purchased from B. a house, part of an estate agreed to be let to B. on a building agreement, and the house was built partly over an archway leading to mews in the rear, but not then forming the only means of access thereto, it was held that A. had constructive notice that when the building scheme was completed, the road under the archway would be the only approach to the mews; and that a right of way, though not expressly reserved in the assignment to A., was reserved by implication (*b*).

(*y*) *Malpas* v. *Ackland*, 3 Russ. 273.
(*z*) *Att.-Gen.* v. *Flint*, 4 Ha. 147.
(*a*) *Hervey* v. *Smith*, 22 Beav. 299; 2 K. & Jo. 389; *sed quære*.
(*b*) *Davies* v. *Sear*, L. R. 7 Eq. 427.

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Notice from dealing with rightful owner in possession.

So, where a rightful owner is in possession of corporeal hereditaments, a purchaser, dealing for any interest in the property, is presumed to have notice of the title under which such possession is held: thus, where the purchasers of mines entered into possession under the agreement, but never took a conveyance, a subsequent purchaser of the land, without any exception of the minerals, was held to have notice of the agreement (c).

Notice of occupier's interests from fact of occupation.

So, notice of the land being in the occupation of a person other than the vendor, has been held to be notice of the occupier's interest (d); and not only of interests connected with the tenancy, but also of interests under collateral agreements: *e. g.*, an agreement for the sale to him of the fee simple (e): and although this has been considered an extreme case (f), its principle has been recognised and followed (g). In every case a prudent purchaser, who has notice that the property is not in hand, will make inquiry as to the nature and extent of the interest of the occupying tenant; but the doctrine that notice of a tenancy is notice of the tenant's equities, has reference merely to equities between the tenant and purchaser after completion of the contract; and is not necessarily notice as between vendor and purchaser, so as to affect their relative rights and liabilities while the contract is still incomplete (h).

So, notice that the occupier holds as tenant to A., is notice of A.'s title (i). So notice that the rents are received by

(c) *Holmes* v. *Powell*, 8 De G. M. & G. 572; and see the remarks of L. J. Knight Bruce, pp. 580, 581.

(d) *Allen* v. *Anthony*, 1 Mer. 282; *Taylor* v. *Stibbert*, 2 Ves. jun. 437, 440; *Hiern* v. *Mill*, 13 Ves. 120; *Meux* v. *Maltby*, 2 Sw. 281.

(e) *Daniels* v. *Davison*, 16 Ves. 249; 17 Ves. 433, and *Douglas* v. *Whitterwronge*, 16 Ves. 254, cited. And see *James* v. *Lichfield*, L. R. 9 Eq. 51; *Phillips* v. *Miller*, L. R. 9 C. P. 196; but see now *Caballero* v. *Henty*, L. R. 9 Ch. Ap. 447.

(f) Per V.-C. Wigram, 1 Ha. 62; and see 2 Russ. & M. 629, and Sug. 762; but see also *Penny* v. *Watts*, 1 Mac. & G. 150.

(g) *Bailey* v. *Richardson*, 9 Ha. 734; *Barnhart* v. *Greenshields*, 2 Eq. R. 1217; P. C.

(h) *Caballero* v. *Henty*, L. R. 9 Ch. Ap. 447; and *vide suprà*, p. 452.

(i) *Bailey* v. *Richardson*, 9 Ha. 734.

A., is notice of A.'s title, and of the instrument under which he claims (*k*), and of the character in which he receives them (*l*). So, notice that receipts have been given to, and accepted by, the vendor for an annual payment as "rent," but which the vendor and purchaser claiming under him subsequently contend was in fact a rent-charge, is notice to the purchaser of the payee's title to the freehold (*m*).

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But a demise of property "as the same was late in the occupation of H. C." has been held not to be notice of an easement to which it was subject during H. C.'s tenancy (*n*); and if the reference were to an existing occupation it does not seem that this could amount to notice of any rights except those of the occupier So, a statement in the particular of sale, that "the property is now, or lately was, in the occupation of H. R. and others," the conditions providing that upon completion the purchaser was to be let into receipt of rents, was held not to be notice of the property being let on leases for lives at low rents (*o*); but in this case there was a suppression equivalent to misrepresentation.

Notice of legal estate being outstanding, its effect.

So, notice of the legal estate being outstanding, is notice of the trusts on which it is held (*p*): and notice that the title deeds are in the possession of a third party, is notice of any charge he has upon the property (*q*): so, notice that the title is a mortgage title, seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption (*r*).

(*k*) *Knight* v. *Bowyer*, 23 Beav. 640.

(*l*) *S. C.*, 2 De G. & Jo. 421.

(*m*) *Att.-Gen.* v. *Stephens*, 1 K. & J. 750; reversed on other points 4 W. R. 189; 6 De G. M. & G. 111.

(*n*) *Martyr* v. *Lawrence*, 2 De G. Jo. & S. 261; *dissentiente* L. J. Knight Bruce, and *quære*: see too, *Polden* v. *Bastard*, L. R. 1 Q. B. 156.

(*o*) *Hughes* v. *Jones*, 3 De G. F. & Jo. 307.

(*p*) *Anon.*, Freem. Ch. Rep. 137.

(*q*) *Hiern* v. *Mill*, 13 Ves.; see p. 122; *Dryden* v. *Frost*, 3 Myl. & C. 670; and see 1 Ha. 61; *Worthington* v. *Morgan*, 16 Sim. 547; see Sug. 772. In order to create a good equitable mortgage by deposit, it is not necessary that all the material title deeds should be deposited. *Lacon* v. *Allen*, 3 Drew. 579; *Roberts* v. *Croft*, 2 De G. & Jo. 1.

(*r*) See *Hansard* v. *Hardy*, 18 Ves.; see p. 462.

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Purchaser held to have notice of facts which he ought to have known.

So, where a person, entitled only for life, represented that she was seised in fee, and conveyed as if so seised, a person claiming under her for valuable consideration was held to be affected with notice; the settlement being the only document under which she could claim the estate (*s*). And, as observed by Lord Lyndhurst (*t*), no one could find fault with that decision; for either the party did or he did not investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only a life estate. So, a lessee (*u*), or a sub-lessee (*x*), has notice of the title of the immediate, and (in the case of a sub-lessee) original lessor (*y*), and the mere fact that he is precluded either by the terms of the contract, or by the recent statute (*z*), from calling for the lessor's title, cannot, it is conceived, exempt him from the consequences of notice.

Where deed is executed in an unusual manner.

So, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed ought to have suggested to his solicitor (*a*): so, where a family solicitor, who had prepared a marriage settlement, became the apparent purchaser of the estate under a fictitious exercise of the usual power of sale, and subsequently executed instruments purporting to vest the estate in the husband, and then, as the husband's solicitor, applied for a loan on mortgage, and delivered an abstract of the title as above referred to, and indorsed in the usual way with his name as solicitor, it was held that the purchaser had implied notice of his having been the

(*s*) *Jackson* v. *Rowe*, 2 Sim. & St. 472 and 475; and see *Roddy* v. *Williams*, 3 J. & L. 1; and see *Peto* v. *Hammond*, 30 Beav. 405.

(*t*) 1 Phil. 255; and see V.-C. Wigram's remarks in *Neesom* v. *Clarkson*, 2 Ha. 173.

(*u*) *Att.-Gen.* v. *Backhouse*, 17 Ves. 293; *Butler* v. *Lord Portarlington*, 1 Dru. & W. 20; *Att.-Gen.* v. *Hall*, 16 Beav. 388.

(*x*) *Steedman* v. *Poole*, 6 Ha. 193; and see *Coser* v. *Collinge*, 3 Myl. & K. 283.

(*y*) See as to affording a sufficient opportunity for examination, *Brumfit* v. *Morton*, 3 Jur. N. S. 1198.

(*z*) 37 & 38 Vict. c. 78, s. 2.

(*a*) *Kennedy* v. *Green*, 3 Myl. & K. 699; *Greenslade* v. *Dare*, 20 Beav. 284.

solicitor who prepared the settlement, and of the irregularity of the nominal purchase (*b*): so, where a purchaser had notice of another person having a judgment or warrant of attorney, affecting the estate, and refrained from making any inquiry, he was held bound; although the incumbrance was in fact a mortgage (*c*): and, as a general rule, if a person knows that another has or claims an interest in the property for which he is dealing, he ought to inquire what that interest is; and if he omit to do so, he may be bound, although the notice was inaccurate as to the particulars or extent of such interest (*d*): *e. g.*, a purchaser, having notice that a legatee had released the executrix from a legacy, and that, *in lieu thereof*, the latter had by will devised a freehold estate to such legatee, was held to have notice of such devise being pursuant to a written agreement between the parties (*e*): so, where a mortgagee or purchaser is informed that there are charges on the property, and he is aware of the existence of certain charges, but neglects, without any fraudulent motive, to make further inquiry, he is liable to be fixed with notice of all charges the existence of which he might have learnt if he had made the inquiry (*f*): so (*g*), a mortgagee not inquiring for the deeds has been postponed to a prior equitable incumbrancer, upon the ground (*h*) of his having purposely abstained from making inquiry, the mortgage being for securing a pre-existing debt; that, in short, there was wilful blindness: and it has been held, in some cases, that the mere omission to ask for the deeds may be sufficient to postpone a mortgagee or purchaser to the equitable lien of the actual holder (*i*); although the case is different if a *bonâ fide* inquiry is made, and a reasonable excuse given, for their non-production (*k*).

Where purchaser, having notice of claim, abstains from inquiry.

Where he omits to inquire for the title deeds.

(*b*) *Robinson* v. *Briggs*, 1 Sm. & G. 188.

(*c*) *Taylor* v. *Baker*, 5 Pri. 306.

(*d*) See *Gibson* v. *Ingo*, 6 Ha. 124.

(*e*) *Penny* v. *Watts*, 1 Mac. & G. 150, 158.

(*f*) *Jones* v. *Williams*, 24 Beav. 47, 59.

(*g*) *Whitbread* v. *Jordan*, 1 Y. & C. 303.

(*h*) 1 Ph. 255.

(*i*) *Worthington* v. *Morgan*, 16 Sim. 547; *Hewitt* v. *Loosemore*, 9 Ha. 449, 458; *Peto* v. *Hammond*, 30 Beav. 861; 8 Jur. N. S. 550.

(*k*) *Hewitt* v. *Loosemore*, *ubi suprà*;

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In one case, the mere omission of a solicitor in preparing a marriage settlement of land in Middlesex, to examine the earlier title, was held sufficient to postpone the settlement to a prior unregistered charge (*l*); but in a recent case in the House of Lords, where the authorities were fully reviewed, it was held that the omission of the solicitor of a legal mortgagee to require production of the title deeds, where a reasonable excuse was given for their non-production, was insufficient to postpone the legal mortgagee to a prior equitable incumbrancer (*m*); and it seems to be now well settled that, although the omission to call for the deeds may be evidence of a design, inconsistent with *bonâ fide* dealing (*n*), to avoid knowledge of the true state of the title, yet it does not of itself amount to constructive notice, except under circumstances from which a fraudulent intention must be presumed (*o*).

In one case mortgagees who allowed the mortgagor to retain the deeds, in order to enable him to raise a specified sum, in priority to their mortgage, were postponed to a subsequent incumbrancer beyond the specified limit, who obtained possession of the deeds without notice of the prior claim (*p*): so, a mortgagee having notice that a bill, which formed part of the consideration for the purchase of the estate by the mortgagor, remained unpaid, has been held bound to inquire whether the vendor has any lien on the estate; the deed of conveyance leaving the point doubtful (*q*): so, a purchaser dealing with trustees for sale at a time or under circumstances suggestive of the probability of the sale being a breach of trust, is bound to inquire and

Where he has reason to suspect a breach of trust.

Espin v. *Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547; *Hopgood* v. *Ernest*, 3 De G. Jo. & S. 116; and *vide infrà* p. 799.

(*l*) *Wormald* v. *Maitland*, 35 L. J. (Ch.) 69; but see comments on this case in *Agra Bank* v. *Barry*, L. R. 7 E. & Ir. Ap. 135.

(*m*) *Agra Bank* v. *Barry*, *ubi suprà*.

(*n*) Per Lord Selborne, in *Agra Bank* v. *Barry*, *ubi suprà*.

(*o*) *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652.

(*p*) *Lloyd* v. *Attwood*, 3 De G. & Jo. 614; *Smith* v. *Evans*, 28 Beav. 59; and see *Carter* v. *Carter*, 3 K. & Jo. 646; *Stackhouse* v. *Lady Jersey*, 1 J. & H. 721.

(*q*) *Frail* v. *Ellis*, 16 Beav. 350.

see whether any such breach is in fact being committed (r): so, a purchaser, buying land with a short title under special conditions, has been held to be affected with notice of a vendor's lien under a sale prior to the stipulated commencement of title (s): so, the mere omission, on the part of a lessee to inquire whether there are any restrictive covenants affecting the property, has been held sufficient, even in the case of a mere yearly tenant, to fix him with notice of the existence of such a covenant (t). Whether the circumstance that a bill of exchange is made payable to the order of a married woman is notice that it relates to her separate estate, appears doubtful (u).

Cases in which a purchaser is not affected with notice.

But, on the other hand, a private Act of Parliament, or a private Act made public (x), is not, in itself, notice to a purchaser: nor is registration of a deed, &c., in a county register (y), nor registration of a judgment at the Common Pleas (z), nor the entry of a document on the court rolls of a manor (a), notice, unless he make a search extending over a period comprising the entry in the register or court rolls (as the case may be): nor is a commission of bankruptcy, nor a vesting order in insolvency, in itself notice (b), although gazetted (c); nor is a decree in a Court of Equity (d), nor a

(r) *Stroughill* v. *Anstey*, 1 De G. M. & G. 635.

(s) *Peto* v. *Hammond*, 30 Beav. 508; 8 Jur. N. S. 550; *Morland* v. *Cook*, L. R. 6 Eq. 252. See *Smith* v. *Evans*, 28 Beav. 59, as to how the lien may be lost by the vendor's acquiescence.

(t) *Wilson* v. *Hart*, L. R. 1 Ch. Ap. 463; and see *Parker* v. *Whyte*, 1 H. & M. 167; *Feilden* v. *Slater*, L. R. 7 Eq. 523; but see and compare *Carter* v. *Williams*, L. R. 9 Eq. 678.

(u) *Dawson* v. *Prince*, 2 De G. & Jo. 41.

(x) 3 Bos. & P. 578; Sug. 758; see *Dawson* v. *Pawer*, 5 Ha. 415.

(y) *Hodgson* v. *Dean*, 2 Sim. & St. 221; affirmed, see Sug. 761. *Query* the remark *contrà*, in *Ford* v. *White*, 16 Beav. 124.

(z) See and consider 2 & 3 Vict. c. 11, s. 5.

(a) *Bugden* v. *Bignold*, 2 Y. & C. C. C. 377; and see *Lane* v. *Jackson*, 20 Beav. 535.

(b) See *Hitchcox* v. *Sedgwick*, on appeal, Sug. 762; *Re Atkinson*, 2 De G. M. & G. 140; *Cannan* v. *South E. R. Co.*, 7 Exch. 843: and see, as to notice, *Pike* v. *Stephens*, 12 Q. B. 465; *Pennell* v. *Stephens*, 7 C. B. 987; *Green* v. *Laurie*, 1 Exch. 335; *Re Barr's Trusts*, 4 K. & Jo. 219, and cases cited: notice to a solicitor's clerk held insufficient.

(c) *Sowerby* v. *Brooks*, 4 B. & Ald. 523.

(d) Sug. 760.

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lis pendens, unless registered in the Court of the Common Pleas (*e*); although in all these cases the purchaser has the means of acquiring notice.

As to lis pendens.

Bellamy v. Sabine.

The general doctrine of *lis pendens* has already been referred to; but requires to be more carefully considered. In *Bellamy* v. *Sabine* (*f*), the principles on which the doctrine depends were fully discussed. The circumstances were shortly these: In 1827, A., a tenant for life, sold his life estate to B., tenant in tail in remainder; shortly afterwards, B. suffered a recovery, and sold the estate to C. in fee; in 1828 B. died, leaving D. his heir-at-law, who, if no recovery had been suffered by B., would have been next tenant in tail. D., in 1830, filed a bill against A. and C. to set aside both sale transactions, on the ground of fraud. Pending the suit, and before a decree was made, C. mortgaged part of the estate to E. In 1835 a decree was made, dismissing the bill against A., but setting aside the sale to C. as fraudulent, and directing a reconveyance from C. to D. free from incumbrances, on payment of what should be found due from D. to C. Subsequently, A, who had not received his purchase-money, filed a bill against D., C, and C.'s incumbrancers, for specific performance of his contract, and the question was as to the right of priority between A. for his unpaid purchase-money, and E. the mortgagee *pendente lite* for his mortgage debt. V.-C. Wood, on the ground that a person who buys pending a suit is to be bound by the result in the same way as if he had been a party to it (*g*), postponed the claim of E. to that of A.: but, on appeal to the full Court, Lord Cranworth, after reviewing the earlier authorities, rested the doctrine, not on the ground of implied notice; the consequence of which might be that the person affected with notice is affected with notice of everything reasonably deducible from or appearing in the suit; but on the ground that a litigant party cannot, pending the litigation, confer any right to the property in dispute, so

(*e*) 2 & 3 Vict. c. 11, s. 7.

(*f*) 3 Jur, N. S. 943; 1 De G. & Jo. 566.

(*g*) See shorthand writer's note of the V.-C.'s judgment, 3 Jur. N. S. 943.

as to prejudice the opposite party; and held that the pendency of D.'s suit against A. and C. did not amount to notice of the equitable rights of A. against C.: and Lord Justice Turner also laid it down that the doctrine is not founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice; but that it is a doctrine which prevails alike both at Law and in Equity; resting on this foundation, *viz.*, that it would be impossible that any action or suit could be brought to a successful termination, if alienation *pendente lite* were permitted to prevail.

Remarks on the doctrine.

This case seems to have established the rule, that *lis pendens* does not affect a defendant with notice of the plaintiff's rights, other than those asserted in the pending litigation. Of course, where the plaintiff claims no interest in the property, as in an interpleader suit, the pendency of the suit will protect the interests of the defendants *inter se.* In one case (*h*), where the deficiency of the testator's personal estate was raiseable out of two real estates separately devised to A. and B., and an order was made in 1846, in a creditor's administration suit, for the sale of A.'s estate alone without prejudice to his right of contribution against B.'s estate, and in 1852 the suit was registered as a *lis pendens*, and shortly afterwards B. mortgaged to C. who had notice of A.'s claim, it was held that there was a *lis pendens* as regarded A.'s rights, and that C.'s claim must be postponed thereto. But in this case the Court had made a decree in favour of one defendant as against his co-defendant, before the registration of the *lis pendens* and the creation of the mortgage; which sufficiently distinguishes it from *Bellamy* v. *Sabine;* and justifies Lord Romilly's decision, that a purchaser, having notice of a registered *lis pendens*, must be taken to have notice also that the Court had made a decree, that one defendant had a right to stand in the place of another (*i*).

Notice of a past tenancy;

So, notice of a past tenancy is no notice of the tenant's

(*h*) *Tyler* v. *Thomas*, 25 Beav. 47.

(*i*) But see Lord St. Leonards' comments, Sug. V. & P. 760.

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of a lease.

equitable interests (k); nor is a purchaser from a derivative lessee affected with constructive notice of peculiar and unusual covenants in the original lease (l); nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it (m); but if he buy under an engagement not to call for his lessor's title, he will have imputed to him all the knowledge, which, by prudent inquiry, he might have obtained (n). Notice of a lease is not, it would seem, notice of collateral facts mentioned in the lease (o): and in order to fix notice, there ought to be a reasonable opportunity for examining the lease (p).

What inquiry should be made on purchasing from trustees.

So, where a sale by fiduciary vendors is apparently regular, a purchaser need not inquire into collateral questions—such as the mode in which the sale has been conducted (q),—although he will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance (r) or suggesting inquiry (s): so notice of a tenancy is not constructive notice of the lessor's title (t): nor, where the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in the body of the conveyance and by the usual indorsed receipt, is the tenancy notice of his lien for any part thereof which may in fact remain unpaid (u): nor will a *bonâ fide* purchaser, otherwise without notice, be affected by the mere circumstance of the

(k) *Miles* v. *Langley*, 1 Russ. & M. 39; and see *Martyr* v. *Lawrence*, 2 De G. Jo. & S. 261; and *vide suprà*, pp. 452, 866.

(l) See *Hanbury* v. *Litchfield*, 2 Myl. & K. 633, and 1 Ha. 62; *Wilbraham* v. *Livesey*, 18 Beav. 209.

(m) *Att.-Gen.* v. *Backhouse*, 17 Ves. 293.

(n) *Robson* v. *Flight*, 11 Jur. N. S. 147; 34 Beav. 118.

(o) See *Darlington* v. *Hamilton*, Kay, 556.

(p) *Brumfit* v. *Morton*, 3 Jur. N. S. 1198.

(q) See *Borell* v. *Dann*, 2 Ha. 440, 450. So, as regards a purchase by trustees; see *Ware* v. *Lord Egmont*, 4 De G. M. & G. 460.

(r) See *Att.-Gen.* v. *Pargeter*, 6 Beav. 150; and *Ker* v. *Lord Dungannon*, 1 Dru. & W. 509, 542.

(s) *Boursot* v. *Savage*, L. R. 2 Eq. 134.

(t) Sug. 762. *Barnhart* v. *Greenshields*, 2 Eq. R. 1217: see and distinguish *Bailey* v. *Richardson*, 9 Ha. 734.

(u) See *White* v. *Wakefield*, 7 Sim. 401.

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vendor having been out of possession for many years (x): nor does the mere absence of the title deeds seem in itself to be notice of the interest of the person holding them (y); although it may be otherwise if their absence is not explained or accounted for (z): nor does notice of the preparation of a draft seem in itself to be notice of the executed deed (a): nor, on the purchase of A., one of two adjoining estates belonging to the same owner, is notice of building covenants entered into by such owner with a mortgagee of the adjoining estate B., notice of the expenditure on both estates of money which, under the covenant, ought to have been expended on B. exclusively (b). So, in a recent case, slight discrepancies in the plans on the deeds which, if inquired into, might have led to the detection of a fraudulent dealing with the property, were held not to be constructive notice of it (c).

Absence of title deeds, how far notice.

It can hardly be doubted, that the mere fact of attesting the execution of a deed will not fix the witness with notice of its contents (d); nor where a purchaser is informed of the existence of an instrument which may, but does not necessarily, affect the property, and he is assured that the instrument does not affect that property, but relates to other property, and he, acting fairly and honestly, believes such statement, and it turns out that he is misled, and that the instrument does relate to the property, will he be fixed with a notice of its contents (e): and it has even been held that

Attesting witness not fixed with notice of contents of deed.

(x) See *Oxwick* v. *Plumer*, Bac. Ab. Mortgage (E.), s. 3; and see 1 Ha. 63.

(y) *Plumb* v. *Fluitt*, 2 Anstr. 432; *Evans* v. *Bicknell*, 6 Ves. 174; and see 1 Ha. 63, and 5 Ha. 279.

(z) *Worthington* v. *Morgan*, 16 Sim. 547; *Hewitt* v. *Loosemore*, 449, 458; see *Dryden* v. *Frost*, 3 Myl. & C. 670; *Atterbury* v. *Wallis*, 2 Jur. N. S. 343; reversed, *ibid.* 1177; *Peto* v. *Hammond*, 30 Beav. 495; 8 Jur. N. S. 550; but see and consider *Agra Bank* v. *Barry*, L. R. 7 E. & Ir. Ap. 135, and cases there cited; and *vide suprà*, p. 869.

(a) See *Cothay* v. *Sydenham*, 2 Bro. C. C. 391.

(b) *Harryman* v. *Collins*, 18 Beav. 19.

(c) *Hunter* v. *Walters*, L. R. 7 Ch. Ap. 75.

(d) *Beckett* v. *Cordley*, 1 Bro. C. C. 357; *Welford* v. *Beezely*, 1 Ves. S. 7; Sug. 781; *Small* v. *Currie*, 2 Dre. 115; and see *Hunter* v. *Walters*, L. R. 7 Ch. Ap. 75.

(e) See *Jones* v. *Smith*, 1 Ph. 244, 253; and see *West* v. *Reid*, 2 Ha. 260; *Atterbury* v. *Wallis*, 2 Jur. N. S. 343; reversed, *ibid.* 1177; *Agra Bank* v. *Barry*, L. R. 9 E. & Ir. Ap. 135, and cases there cited.

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where he is aware that the instrument affects the property, and he has not availed himself of the opportunity of examining it, that he is not affected with notice, if he, in good faith, relies on the vendor's statement of its contents (*f*): but it is the clear duty of the purchaser in such a case to satisfy himself, by having the deed examined on his behalf; and this decision must be cautiously followed (*g*).

Recitals, how far notice.

Nor will a purchaser be affected by an ambiguous recital (*h*); though, as we have seen, an erroneous recital of an instrument may fix him with knowledge of its true contents, if he has had the opportunity of testing it (*i*); nor is he bound by circumstances inducing merely a suspicion of fraud (*k*); or by the usual trusts of a term assigned to attend the inheritance (*l*), where no reference is made to any particular instrument or course of limitations: so, notice of there being a change in the solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the ownership of such interest (*m*): so, although mere general notice of an instrument is sufficient to fix the purchaser with notice, it will be otherwise where it is accompanied by an erroneous specific statement of the contents of such instruments (*n*).

General notice of a document, when insufficient.

In a modern case, where the legatee of a legacy charged on land, assigned it for value, and then, without the concurrence of the assignee, joined in mortgaging the estates first to A. and then to B., the latter mortgage being expressed to be "subject to prior incumbrances," but B. had no notice of the assignment of the legacy, and the mortgagors did not appear to have intended to include it among "prior incumbrances," B. was held to have priority of the assignee (*o*).

(*f*) *Cox* v. *Coventon*, 31 Beav. 378.

(*g*) See 1 Ph. 253; and *vide suprà*, p. 870.

(*h*) *Kenney* v. *Browne*, 3 Ridg. P. C. 512; and see 2 Ha. 175.

(*i*) See *Hope* v. *Liddell*, 21 Beav. 183; and *vide suprà*, p. 864.

(*k*) Sug. 779; *M'Queen* v. *Farquhar*, 11 Ves. 467; and see *Cockroft* v. *Sutcliffe*, 2 Jur. N. S. 323.

(*l*) Sug. 779.

(*m*) *West* v. *Reid*, 2 Ha. 249.

(*n*) *Re Bright's Trusts*, 21 Beav. 434, and *vide suprà*, p. 843.

(*o*) *Greenwood* v. *Churchill*, 8 Beav. 314.

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Purchaser, whether bound to use excessive caution.

And it appears that, as a general rule, the mere omission to pursue inquiries to the extent to which a prudent, cautious, and wary person would ordinarily extend them, is not, in itself, sufficient to fix a *bonâ fide* purchaser with notice of what he might have ascertained by pursuing such inquiries (p): the fact of the conveyance being in consideration of a pre-existing debt, would, of course, induce a doubt whether the purchaser were acting *bonâ fide;* and the omission to inquire after the title deeds of a property, unless otherwise satisfactorily explained (q), would probably be attributed to a suspicion that the inquiry if made would lead to disclosures affecting the title (r).

Whether his omitting to examine the deeds sufficient to postpone him.

Where A., a solicitor, mortgaged property to B., his client, and handed over to him a bundle of documents which he falsely represented to be the title deeds, and afterwards sold the property to C., and delivered to him the title deeds which he had fraudulently retained, it was held that B.'s negligence in not examining the parcel of deeds was not sufficient to postpone him to C. (s): so, where the earlier title deeds were deposited with A., and the later with B., as securities for moneys severally advanced by them, A.'s deposit being prior in point of time, it was held that A.'s omission to call for the later deeds, which alone showed any title in the mortgagor, did not postpone his security to that of B. (t): so, the omission of a transferee of a mortgage to give notice of the transfer to the mortgagor, who has, for want of such notice, dealt with the original mortgagees as if they were still his creditors, has been held not to prejudice the transferee's right of foreclosure (u).

(p) See 1 Phil. 257; 1 J. & L. 441; Sug. 772, 775; *Agra Bank* v. *Barry*, L. R. 7 E. & Ir. Ap. 135.

(q) See *Agra Bank* v. *Barry*, *ubi suprà*, and *Ratcliffe* v. *Barnard*, L. R. 6 Ch. Ap. 652.

(r) *Hewitt* v. *Loosemore*, 9 Ha. 458; and see *Worthington* v. *Morgan*, 16 Sim. 547; and *Penny* v. *Watts*, 1 Mac. & G. 150.

(s) *Hunt* v. *Elmes*, 28 Beav. 631; affirmed, 2 De G. F. & Jo. 578; *Ratcliffe* v. *Barnard*, *ubi suprà*; and *vide suprà*, p. 870.

(t) *Roberts* v. *Croft*, 2 De G. & Jo. 1.

(u) *Withington* v. *Tate*, L. R. 4 Ch. Ap. 288.

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Notice to counsel, solicitor or agent is notice to purchaser.

The purchaser, (although an infant purchasing under the sanction of a Court of Equity (x), is bound by notice to his counsel (y), solicitor, or agent (z), or, perhaps, trustee (a), if acquired either in the same transaction (b), or in a prior transaction, but under circumstances which satisfy the Court that the notice must have been recollected (c). The presumption against such recollection, would, no doubt, be stronger in the case of counsel than of a solicitor (d); and, even as respects a solicitor, there seems to be a difficulty in holding that a purchaser, employing one who has not acted for the vendor, can be affected by notice acquired by him previous to retainer (e). In one case, where an annuity deed was prepared by the grantee's solicitor, containing a covenant by the grantor that the property was free from other incumbrances, the grantee was held not to have constructive notice of an undisclosed mortgage which his solicitor, in conjunction with other persons, had upon the property (f).

Although solicitor, &c., is employed by both parties, or is himself the vendor.

In the third edition of this work it was stated that, as a general rule, the purchaser is equally affected with notice, although the solicitor, &c., be also employed by the vendor (g), or be himself the vendor (h); but later decisions have some-

(x) *Toulmin* v. *Steere*, 3 Mer. 210.

(y) *Sheldon* v. *Cox*, Amb. 624.

(z) *Toulmin* v. *Steere*, *ubi suprà*, *Cookson* v. *Lee*, 23 L. J. Ch. 473; *Wilkins* v. *Sibley*, 9 Jur. N. S. 888.

(a) *Wise* v. *Wise*, 2 J. & L. 403.

(b) *Brotherton* v. *Hatt*, 2 Vern. 574; *Lowther* v. *Carlton*, 2 Atk. 242; *Wilde* v. *Gibson*, 1 H. L. C. 614, 624; *Twycross* v. *Moore*, 13 Ir. Eq. R. 250.

(c) *Hargreaves* v. *Rothwell*, 1 Ke. 154; *Brothers* v. *Bence*, Fitz. 118; *Perkins* v. *Bradley*, 1 Ha. 219, (in which two cases the solicitor was his own client in the later transaction); *Fuller* v. *Bennett*, 2 Ha. 394; *Nixon* v. *Hamilton*, 2 Dru. & Wal. 391, 393. *Lenehan* v. *M'Cabe*, 2 Ir. Eq. 342, 352; *Gerrard* v. *O'Reilly*, 3 Dru. & W. 414, 431; and see *Tylee* v. *Webb*, 6 Beav. 552.

(d) See 5 Jarm. Conv. by S. 490; *Brine* v. *Featherstone*, 4 Taunt. 873.

(e) See *Fuller* v. *Bennett*, 2 Ha. 394, 404, and Lord Cottenham's remarks as to Mr. Wightwick's evidence in *Wilde* v. *Gibson*, 1 H. L. Ca. 614, 624; *Lane* v. *Jackson*, 20 Beav. 535, as to notice to corporations, &c., through agent, of acts of bankruptcy, *vide suprà*, p. 845, n. (u).

(f) *Thompson* v. *Cartwright*, 33 Beav. 178; affirmed 9 Jur. N. S. 1215; 2 De G. Jo. & S. 10.

(g) *Le Neve* v. *Le Neve*, 3 Atk. see p. 648; *Dryden* v. *Frost*, 3 M. & C. 670; *Sharpe* v. *Foy*, L. R. 4 Ch. Ap. 35; *Rolland* v. *Hart*, L. R. 6 Ch. Ap. 678.

(h) *Sheldon* v. *Cox*, Ambl. 624;

what modified this rule. Thus, the mere fact of the mortgagor being a solicitor and himself preparing the deed, and of the mortgagee employing no independent professional adviser, has been held insufficient to fix the the latter with notice of a prior incumbrance known to the solicitor (i): the mortgagee or purchaser may not desire to employ a solicitor, but if he knowingly constitute the relation of solicitor and client between himself and the solicitor of the party with whom he is dealing, he will, of course, be affected with notice of any prior incumbrances of which the solicitor is cognizant (k): and though a purchaser is not necessarily to be held to have employed his vendor's solicitor, because he employed no other, yet if he employ no solicitor, he must be held to have exactly the same knowledge, and be liable for negligence to the same extent, as if he had employed one (l).

Client, how far affected with notice of fraud by his solicitor.

It was decided by Lord Brougham, in opposition to the opinion of Sir J. Leach, that a client is not to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal (m). This decision may, perhaps, be thought to be inconsistent with others, in which it has been held, that a mortgagee, employing the mortgagor as his counsel or solicitor, is affected with notice of a prior, and, *as against the client-mortgagee*—which is sufficient to bring the case within Lord Brougham's reasoning—*fraudulent* incumbrance created by such mortgagor (n). Thus, where a solicitor took a mortgage of an equity of redemption, which he submortgaged, and afterwards joined with the first mortgagee and the mortgagor in

Dryden v. *Frost*, *ubi suprà*; *Hewitt* v. *Loosemore*, 9 Ha. 449; *Robinson* v. *Briggs*, 1 Sm. & G. 188; *Spencer* v. *Topham*, 22 Beav. 573.

(i) *Espin* v. *Pemberton*, 4 Drew. 333; 3 De G. & Jo. 547.

(k) *S. C.*; and see *Perry* v. *Holl*, 2 De G. F. & Jo. 38.

(l) Per Lord Romilly, in *Atterbury* v. *Wallis*, 2 Jur. N. S. 344, 1177; 8 De G. M. & G. 454.

(m) *Kennedy* v. *Green*, 3 Myl. & K. 699; *Atterbury* v. *Wallis*, 2 Jur. N. S. 1177; *Willes* v. *Greenhill*, 29 Beav. 387; *Ex parte Rogers*, 8 De G. M. & G. 271; and compare *Rolland* v. *Hart*, L. R. 6 Ch. Ap. 678.

(n) *Sheldon* v. *Cox*, Amb. 624; *Majoribanks* v. *Hovenden*, 6 Ir. Eq. R. 238; but see *Kendall* v. *Hulls*, 11 Jur. 864: *Hewitt* v. *Loosemore*, 9 Ha. 457; *Hopkins* v. *Amery*, 2 Giff. 292; 6 Jur. N. S. 1047.

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a new mortgage of the property, acting as the solicitor of all parties in the transaction, but not disclosing the existence of the submortgage, it was held that the new mortgagee was affected with the solicitor's knowledge, and his security was to that extent displaced (*o*). So, where a purchaser employed one of three fiduciary owners as his solicitor in the transaction, he was fixed with constructive notice of the trust (*p*). So, in a recent case (*q*), where a solicitor on behalf of A., one of his clients, procured from B., another client, an advance on mortgage of A.'s land in Middlesex, and then, concealing the incumbrance, induced C., also a client, to lend money on mortgage of the same estate, and C.'s security was the first registered, it was held that the case did not fall within the principle of *Kennedy* v. *Green*; and that C., having notice through the solicitor of B.'s mortgage, could not gain priority over it by registration.

Tendency of recent decision.

But the tendency of the recent decisions is to restrict the doctrine of constructive notice, so far as is compatible with the rules of the Court applicable to fraud; especially so in cases where it is only through the employment of a solicitor, who is, or must be supposed to be, cognizant of the concealed incumbrance or defect, that notice of it is brought home to the client: and it may be laid down as a general rule, that where the solicitor is acting *bonâ fide*, the mere omission on his part to adopt all the precautions which a prudent professional adviser would have taken on behalf of his client will not, in the absence of gross negligence or other circumstances indicative of fraud, fix the client with constructive notice of what might have been elicited by inquiry.

Notice to town agent of solicitor.

Notice to a town or country agent, would, in general, be notice to the principal solicitor (*r*): but, probably, the mere

(*o*) *Atterbury* v. *Wallis*, 8 De G. M. & G. 454; see too *Roberts* v. *Croft*, 2 De G. & Jo. 1; *Hunt* v. *Elmes*, 28 Beav. 631; 2 De G. F. & Jo. 578; *Ogilvie* v. *Jeaffreson*, 2 Giff. 353; 6, Jur. N. S. 970; cases of *subsequent* fraud by the solicitor.

(*p*) *Bournot* v. *Savage*, L. R. 2 Eq. 134.

(*q*) *Rolland* v. *Hart*, L. R. 6 Ch. Ap. 678, 683.

(*r*) See and consider *Norris* v. *Le Neve*, 3 Atk. 87; Sug. 756.

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fact of the purchaser's solicitor allowing (from motives of private friendship,) the vendor's solicitor to transact, for his own benefit, the principal part of the business which is usually done by the former, would not be sufficient to constitute an agency (s).

Professional confidential communications, notice not to be proved by.

For the purpose of fixing a purchaser with notice, the evidence of his counsel, solicitor (t), or (probably) certificated conveyancer (u), respecting confidential (x), professional communications, is inadmissible: and the rule includes the clerk of the professional adviser (y), and the agent (z) or accountant (a) employed by the solicitor; and also, according to a modern decision in Equity, a person whom the client consults as, and supposing him to be, a solicitor, but who is not so in fact (b): but not (it would appear) an unprofessional agent employed by the purchaser himself (c), unless he be used merely as the medium of communication with the professional adviser (d): and the privilege extends to communications made through an unprofessional agent to the professional adviser (e).

Who are within the rule.

Who are not within the rule.

But the rule does not include a solicitor whom the purchaser consults, not professionally, but as a friend, agent, or steward (f); nor, where the same solicitor is employed by

(s) See *Kendall* v. *Hulls*, 11 Jur. 864.

(t) See *Parkhurst* v. *Lowten*, 2 Sw. 194; *Volant* v. *Sayer*, 13 C. B. 231.

(u) See *Cromack* v. *Heathcote*, 2 Bro. & Bing. 4; Gresley on Ev. 380, 2nd edit.

(x) *Walsh* v. *Trevanion*, 15 Sim. 577.

(y) *Taylor* v. *Forster*, 2 Car. & P. 95; *Foot* v. *Hayne*, Ry. & Mo. 165; *Chant* v. *Brown*, 9 Ha. 794.

(z) *Steele* v. *Stewart*, 1 Ph. 471; *Lafone* v. *Falkland Islands Co.*, 4 K. & J. 34.

(a) *Walsham* v. *Stainton*, 2 H. & M. 1.

(b) *Calley* v. *Richards*, 19 Beav. 404; see *contrà*, at Law, *Fountain* v. *Young*, 6 Esp. 113.

(c) *Kerr* v. *Gillespie*, 7 Beav. 572; and see 1 Ph. 693; *Glyn* v. *Caulfield* 3 Mac. & G. 463.

(d) *Reid* v. *Langlois*, 1 Mac. & G. 627.

(e) *Carpmael* v. *Powis*, 1 Ph. 687; *Russell* v. *Jackson*, 9 Ha. 387.

(f) See *Wilson* v. *Rastall*, 4 T. R. 753, 759; *Hughes* v. *Biddulph*, 4 Russ. 190; *Greenlaw* v. *King*, 1 Beav. 137; and see *Blenkinsopp* v. *Blenkinsopp*, 10 Beav. 277; reversed on further evidence, 2 Phil. 607; *Goodall* v. *Little*, 1 Sim. N. R. 155; *Ex parte Hawley*, 20 L. T. 253.

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both parties, does it extend to communications which the purchaser makes to him as solicitor for the vendor (*g*): nor to communications made to the solicitor from collateral quarters (*h*); nor to a map of the estate which the owner leaves with his solicitor for the purpose of effecting a sale (*i*); nor to matters which have come to his knowledge unprofessionally (*k*); nor to communications between co-defendants (*l*), or between the solicitors of adverse parties (*m*); nor to cases of fraud or other criminality (*n*): but it extends to all communications which take place between the purchaser and his solicitor (as such) with reference to the purchase (*o*), and to documents belonging to the purchaser which he leaves with his solicitor (*p*): nor does the privilege cease by reason of the professional adviser acquiring a personal interest in the property to the title of which the confidential communication related (*q*); or of his having ceased to practise (*r*).

To whom the privilege extends.

The privilege is for the protection of the client, not for the benefit of the solicitor; and it is good as against all persons claiming adversely to the client; but not as between

(*g*) See *Perry* v. *Smith*, 9 M. & W. 681.

(*h*) *Sawyer* v. *Birchmore*, 3 Myl. & K. 572. As to documents being privileged on the ground of their political character, see *Wadeer* v. *The East India Co.*, 2 Jur. N. S. 407. As to illegal secrets, see *Gartside* v. *Outram*, 3 Jur. N. S. 39.

(*i*) *Doe d. Marriott* v. *Lord Hertford*, 13 Jur. 632.

(*k*) *Dwyer* v. *Collins*, 7 Exch. 639.

(*l*) *Goodall* v. *Little*, 1 Sim. N. R. 155; *Glyn* v. *Caulfield*, 3 Mac. & G. 463; and see *Jenkins* v. *Bushby*, L.R. 2 Eq. 547.

(*m*) *Gore* v. *Harris*, 15 Jur. 1168, V.-C. P.; *S. C.*, as *Gore* v. *Bowser*, 5 De G. & S. 30.

(*n*) *Reg.* v. *Avery*, 8 C. & P. 596; *Gartside* v. *Outram*, 3 Jur. N. S. 39; *Follett* v. *Jefferyes*, 1 Sim. N. S. 3; *Charlton* v. *Coombes*, 9 Jur. N. S. 534.

(*o*) See *Clagett* v. *Phillips*, 2 Y. & C. C. C. 82; *Carpmael* v. *Powis*, 1 Ph. 692; *Herring* v. *Clobery*, 1 Ph. 91; *Jones* v. *Pugh*, 1 Ph. 96: as to forms of the demurrer, see *Walsh* v. *Trevanion*, 15 Sim. 577.

(*p*) Sug. 785; but where land was recovered in ejectment, the solicitor of the defendant was held bound in Equity to state to whom he had on behalf of his client delivered the title deeds; *Banner* v. *Jackson*, 1 De G. & S. 472. So, at Law, the solicitor of a mortgagee has been compelled to show a deed for the mere purpose of identification; *Phelps* v. *Prew*, 3 El. & B. 430.

(*q*) *Chant* v. *Brown*, 7 Ha. 79.

(*r*) *Calley* v. *Richards*, 19 Beav. 404.

persons claiming under him (s). In one case it appears to have been considered doubtful whether the privilege does not cease on the death of the client (t).

Nor will purchaser be obliged to produce cases, opinions, &c.

It appears that even the purchaser himself will not, if a suit be instituted against him, be bound to produce letters written, or cases stated, for the opinion of counsel, either by himself or his solicitor, with a view either to that suit or even to a suit with third parties, if respecting the same matter and involving the same question to which such letters and cases relate; nor *à fortiori*, the opinions obtained on such letters and cases (u); and, according to recent decisions, the same privilege seems to exist in favour of cases laid before counsel and letters written to a solicitor for legal advice with reference to a known defect in title, although not with any view to threatened litigation (x): but, of course, an opinion which in effect was taken for the joint benefit of the party seeking and the party refusing production is not protected (y). An opinion taken by another party in the same interest, and confidentially com-

(s) See *Gresley* v. *Mousley*, 2 Jur N. S. 156; 2 K. & Jo. 288; *Russell* v. *Jackson*, 9 Ha. 387.

(t) *Charlton* v. *Coombes*, 9 Jur. N.S. 534, 536.

(u) *Holmes* v. *Baddeley*, 1 Ph. 476: and see earlier cases there cited. *Brown* v. *Oakshott*, 12 Beav. 252; *Thompson* v. *Falk*, 1 Dre. 21; *Wright* v. *Vernon*, 1 Dre. 344; *Jenkyns* v. *Bushby*, L. R. 2 Eq. 547.

(x) See *Pearse* v. *Pearse*, 1 De G. & S. 12; *Herring* v. *Cloberry*, 1 Ph. 91; *Holmes* v. *Baddeley*, *ib.* 476; *Lord Walsingham* v. *Goodricke*, 3 Ha. 122; *Reece* v. *Trye*, 9 Beav. 316; *Penruddock* v. *Hammond*, 11 Beav. 59, 61; *Hawkins* v. *Gathercole*, 1 Sim. N. R. 150; *Manser* v. *Dix*, 1 K. & J. 451; *Calley* v. *Richards*, 19 Beav. 401; *Manby* v. *Bewicke*, 8 De G. M. & G. 476; but see *Beadon* v. *King*, 17 Sim. 34; *Flight* v. *Robinson*, 8 Beav. 22. As to cases of fraud, see *Addie* v. *Campbell*, 1 Beav. 258; *Bassford* v. *Blakesley*, 6 Beav. 131, and cases there cited; *Kelly* v. *Jackson*, 13 Ir. Eq. R. 129; *Swift* v. *M'Ternan*, 13 Ir. Eq. R. 119; *Follett* v. *Jefferyes*, 1 Sim. N. R. 1; 13 Jur. 465; on appeal 972; *Reynell* v. *Sprye*, 10 Beav. 51; 11 Beav. 618; 15 Jur. 1046, C. A.; 21 L. J. 13; *Chadwick* v. *Chadwick*, 16 Jur. 1060. The mere connection of the documents with the acts impeached by the bill is no ground for their production, see 13 Jur. 972; and see *Russell* v. *Jackson*, 9 Ha. 387; *Stainton* v. *Chadwick*, 13 Beav. 320; 3 Mac. & G. 575.

(y) *Reynell* v. *Sprye*, 10 Beav. 51; and see *Warde* v. *Warde*, 3 Mac. & G. 365; a case of husband and wife: and *Tugwell* v. *Hooper*, 10 Beav. 348, where the solicitor taking the opinion was a trustee for both the litigants; *Devaynes* v. *Robinson*, 20 Beav. 42.

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municated to the purchaser, the latter not only need not produce, but is actually bound to conceal (z).

Effect of notice.

As to the effect of notice when established:—It may be laid down as a general rule, that a purchaser with notice, is, in Equity, "bound to the same extent, and in the same manner as the person was of whom he purchased" (a): for instance, he will be bound by a trust, or incumbrance, or by any agreement respecting the estate, of which he has notice, and which would have bound the estate in the hands of the vendor (b).

Notice of void or voidable estates, agreements, &c., how far binding.

The consideration of how far the purchaser is bound by notice of an executory or executed agreement, which is, either wholly or in part, void or voidable, gives rise to questions of greater difficulty.

Purchaser from tenant for life and remainder-man held bound to give effect to agreement by former for grant of unauthorized lease: *sed qu.*

Where A., seised in fee, in consideration of his son's marriage settled the estate on himself for life, with remainder to his son for life, with the usual limitations in strict settlement on his son's issue, with remainder to himself (A.) in fee; and with power for A. to lease, and with his son to sell the estate; and A. agreed to grant a lease exceeding the power; and then A. and his son sold the estate, the purchaser, who had notice of the agreement, was compelled to perform it at the suit of the intended lessee (c). Lord Rosslyn thought that A.'s agreement bound the estate except as against the son and other remaindermen claiming under the settlement, and that the sale took the estate out of the settlement and left it indefeasibly impressed with the agreement (d). Lord Redesdale has expressed an opinion that the purchaser, except to the extent of A.'s life estate and remainder in fee, ought not to have been bound (e).

(z) *Enthoven* v. *Cobb*, 5 De G. & S. 597, and 2 De G. M. & G. 632: and see *Few* v. *Guppy*, 13 Beav. 457.

(a) Sug. 749; *Taylor* v. *Stibbert*, 2 Ves. jun. 439.

(b) See *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Rose* v. *Watson*, 10 H. L. Ca. 672.

(c) *Taylor* v. *Stibbert*, 2 Ves. jun. 437; Sug. Pow. 8th edit. 765.

(d) See p. 442.

(e) See 2 Scho. & L. 599, and *Harrison* v. *Duignan*, 2 Dru. & W. 304.

Lord St. Leonards seems to consider (*f*) that the decision can be supported on the ground that the purchaser was bound to indemnify the vendor against his liability to damages under the contract; and he refers to a case (*g*) where a copyholder having granted a lease renewable with the lord's licence, and the lord having, in the name of a trustee, purchased the copyhold interest with notice of the lease, and having refused to renew, a bill was filed by the lessee for specific performance, and Lord Eldon directed a case to be submitted to the Common Pleas as to whether damages could be recovered by the lessee upon the lessor's covenants, and upon receiving an opinion in the negative dismissed the bill. This, however, can scarcely be considered a decision: and it may be doubted whether the vendor's right to an indemnity (supposing it to exist) can give to the lessee a better hold *upon the estate* than he originally possessed.

Purchaser who buys expressly subject to non-existent or voidable interest, bound thereby.

It has been held that a purchaser who buys expressly subject to a partial interest which has no existence (*h*) or is voidable (*i*), cannot dispute the right of the party in whose favour the reservation is made: but where a mortgage to A. falsely recited an equitable charge in favour of B., and such charge was subsequently created by the owner of the equity of redemption, it was held that A. must stand as first incumbrancer (*k*): so, where a mortgage was given by A. and B. as his surety, to secure C. against the payment of a sum of money which the deed represented him to be liable to pay to D. as surety for A. and B., or one of them, and C., though morally bound, was in fact under no legal obligation to repay D., it was held that B. was not liable under the mortgage for the debt due to D. (*l*).

(*f*) Sug. 751.

(*g*) *Lufkin* v. *Nunn*, 11 Ves. 170; and see *Nokes* v. *Gibbon*, 3 Drew. 681.

(*h*) *Prettyman's case*, cited in *Walton* v. *Earl Stanford*, 2 Vern. 279; but the rule seems to be otherwise at Law, see *Doe* v. *Archer*, 1 Bos. & P. 531.

(*i*) See *Neild's case*, cited 1 Moll. 453; and see *Leader* v. *Aherne*, 2 Con. & L. 534.

(*k*) *Fraser* v. *Jones*, 5 Ha. 475; affd. 12 Jur. 443.

(*l*) *Lake* v. *Brutton*, 18 Beav. 34; 8 De G. M. & G. 440.

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Where sold subject to voidable leases.

It has even been held in Ireland (m) that where an estate is sold, subject to void or voidable leases, the vendor may set them aside for his own benefit, upon securing to the purchaser the payment of the rents and performance of the covenants: but the point is treated as doubtful by Lord St. Leonards (n); although he judicially admits that "if a man buys an estate subject to an incumbrance, and it turns out that it is not a valid incumbrance, yet he may so buy it as not to leave him the power to impeach it." (o)

Remarks on *Maguire* v. *Armstrong*.

In the case last referred to (p), where the vendors attempted to set aside leases for their own benefit without the consent of the purchaser of the reversion, Sugden, C., held that they had no such equity, and could not impeach the leases, unless they could also impeach the sale of the reversion (q.) This decision was reversed by Plunket, C.: he considered *Maguire* v. *Armstrong* an authority, and as founded on the clearest principles of common sense. He, however, went on to observe (r), that "the purchaser had a right to be secured in his rents by proper covenants in any new leases; this was done in *Maguire* v. *Armstrong*:" thus admitting the right of the purchaser to have as good a security as he had under the original leases;—and not adverting to the impossibility of determining the relative values of covenants by the lessees and covenants by the vendors (s). Now *Maguire* v. *Armstrong* seems to be no authority for disregarding this difference; for the Court there appears (t) to have recognised the purchaser's right to have as good a security as he before had for the rents and covenants, and to have founded its decision

(m) *Maguire* v. *Armstrong*, 2 Ba. & B. 538, 548; and see *Blakeney* v. *Bagott*, 3 Bli. N. S. 248, 257.

(n) Sug. 752.

(o) Ll. & G. tem. Sug. 215, 216; *Wood* v. *Marquis of Londonderry*, 10 Beav. 465.

(p) *Muskerry* v. *Chinnery*, Ll. & G. tem. Sug. 185; 7 Cl. & F. 1; 1 H. L. Ca. 576.

(q) Ll. & G. tem. Sug. 219. See, as to the confirmation of voidable leases, 12 & 13 Vict. c. 26, and 14 Vict. c. 17.

(r) Ll. & G. tem. Pl. 1.96.

(s) "I apprehend that this Court can never enter into the question whether the covenant which binds the assets of the executors and trustees of W. P. is or is not an equivalent for the original covenant by W. P.," *per* V.-C. Shadwell, 16 Sim. 390; and see *Ridgway* v. *Gray*, 1 Mac. & G. 109; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602.

(t) See 2 Ba. & B. 548.

upon the assumption (which seems to have been acquiesced in by the plaintiff) that, in the particular case before the Court, the covenants of the defendant might be considered equivalent to the covenants of the lessees. An appeal to the Lords from Lord Plunket's decision went off upon another point (*u*).

But it seems clear, on principle, that if a vendor possess any such right, the substituted security for the rent and covenants should be given to the purchaser before the commencement of litigation against the tenants; and should be binding whatever may be its result: for, "the very litigation might unsettle and ruin the tenant and after all prove unsuccessful" (*x*).

Purchaser, when able to avoid lease.

"Where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance with full notice, yet he will not be bound by it" (*y*): but where land subject to a lease of a way-leave at a reserved rent determinable by the lessee, was sold apart from the rent, and the purchaser of the land agreed with the lessee to determine the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent, the latter was held entitled to have it made good out of the new contract (*z*). So, a purchaser buying a lease, with notice of a charge upon it, cannot in Equity, as against the incumbrancer, merge the lease in the reversion (*a*).

Purchaser of estate in mortgage—when able to dispute voidable leases.

It was held, in a modern case, where a person, having mortgaged in fee, demised the property without the concurrence of the mortgagee, that a purchaser of the fee-simple, who by one deed took a conveyance of the legal estate from the mortgagee, and of the equity of redemption from the

(*u*) See *Sheehy* v. *Muskerry*, 7 Cl. & Fin. 1.

(*x*) *Per* Sugden, C., Ll. & G. tem. Sug. 218.

(*y*) Sug. 751, citing *Lufkin* v. *Nunn*, 11 Ves. 170.

(*z*) *Wood* v. *Marquis of Londonderry*, 10 Beav. 465.

(*a*) See *Haig* v. *Hogan*, 4 Bli. N. S. 380; and *Rutledge* v. *Rutledge*, 2 Bli. N. S. 352.

representative of the mortgagor, was not estopped at Law, although he received rent from the tenant; but might eject him after the expiration of the usual notice to quit (*b*): he would, however, have been estopped, if the mortgagor had got in the legal estate prior to the conveyance, and the want of title had not appeared on the face of the lease (*c*). And, in a later case, where a mortgagor in possession granted a lease, which did not disclose the fact of the mortgage, or that the legal estate was outstanding in a trustee for the mortgagor; and subsequently, by apt words of conveyance, granted the reversion by a deed which showed the want of legal title, it was held that the assignee had the reversion by estoppel, and could sue the lessee on covenants running with the land (*d*). It was treated by the Court as well established, that where a lessor without any legal estate or title, demises to another, the parties themselves are estopped from disputing the validity of the lease on that ground. If the lessor subsequently acquires a title, the lease and reversion then take effect in interest, and not by estoppel; and an action will lie, either way, for breach of the covenants in the lease. And the Court also laid down the doctrine that the assignee of a lessor, who has no estate in the land, has the reversion by estoppel as against the lessee (*e*).

Assignee of voidable lease entitled by estoppel.

Where a leasing power is reserved to the mortgagor.

On a demise of an estate in mortgage, the lessees' covenants are usually entered into with the mortgagees, in order that they may run with the reversion at law: and where a leasing power is expressly reserved to the mortgagor, it is generally made a condition of its exercise, that the appointee shall covenant with the mortgagees by name, and that the right of re-entry shall be limited to them. But it seems the sounder view that, where the lease operates under a power, the benefit of the covenants devolves with the legal reversion, whether the reversioners at Law be named as covenantees or not (*f*).

(*b*) *Doe d. Lord Downe* v. *Thompson*, 9 Q. B. 1037.

(*c*) See *Right d. Jeffreys* v. *Bucknell*, 2 B. & Ad. 278; *Cuthbertson* v. *Irving*, 4 Hurl. & Nor. 742; 6 Hurl. & Nor. 135; 28 L. J. N. S. 306, 308.

(*d*) *Cuthbertson* v. *Irving*, *ubi suprà.*

(*e*) See cases cited in *Cuthbertson* v. *Irving*, *ubi suprà.*

(*f*) See and consider *Greenaway* v.

Notice of a conveyance which comes within the provisions of the 27 Eliz. c. 4 (g), as being made for the purpose of defrauding purchasers, or as reserving a power of revocation to the grantor (h), is immaterial; and the purchaser's title will be good at Law and in Equity (i): and the volunteers have no claim against the purchase-money paid to the settlor (k).

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Notice of fraudulent conveyances, &c., immaterial.

A legal mortgagee is, of course, a purchaser *pro tanto* (l): so, also, is an equitable mortgagee by deposit, with memorandum of agreement for a legal mortgage (m): so, a lessee at rack-rent (n) is within the Statute, but not a lessee without fine or rent (o): so, also, a purchaser under an ante-nuptial settlement (p); or one who, in consideration of the conveyance, waives a disputed right (q): and, in one case, a person claiming for value under a general assurance of "all the estate" of the conveying party, was held to be within the Act (r). But it has been held in Ireland (s), and more recently in England (t), that a registered judgment creditor is not a purchaser within the meaning of the Statute.

Who are purchasers within the statute.

It is settled that a mere voluntary conveyance (unless, perhaps, it be in favour of a charity (u), is fraudulent within

What conveyances are fraudulent within the statute.

Hart, 14 C. B. 340. Since the 8 & 9 Vict. c. 106, s. 5, a person not named as party to a deed may take the benefit of a covenant or condition respecting hereditaments.

(g) See 39 Eliz. c. 18, s. 31.

(h) See sect. 5.

(i) *Gooch's case*, 5 Rep. 60; *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Buckle* v. *Mitchell*, 18 Ves. 100.

(k) *Daking* v. *Whimper*, 26 Beav. 568.

(l) *Doe* v. *Webber*, 1 Ad. & E. 733; *Chapman* v. *Emery*, Cowp. 279.

(m) *Lister* v. *Turner*, 5 Ha. 281; *Ede* v. *Knowles*, 2 Y. & C. C. C. 172; but the deeds may be recovered at Law, *Kerrison* v. *Dorrien*, 9 Bing. 76.

(n) *Goodwright* v. *Moses*, 2 Bl. 1019.

(o) *Upton* v. *Bassett*, cited in *Twyne's case*, see Smith's Leading Cases, vol. ii., p. 1.

(p) *Douglas* v. *Ward*, 1 Cha. Ca. 79; but not, of course, where it is post-nuptial.

(q) *Hill* v. *Bishop of Exeter*, 2 Taunt. 69.

(r) *Stone* v. *Van Heythuysen*, 11 Ha. 126.

(s) *Evans* v. *Evans*, 2 Ir. Ch. R. 242.

(t) *Beavan* v. *Lord Oxford*, 2 Jur. N. S. 121; 6 De G. M. & G. 507, before the full court of Appeal; and see the cases there cited, and the judgment.

(u) As to whether there is any exception in favour of a charity, *vide infrà*, p. 892.

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the meaning of the Statute, even although made by the direction of the Court (x): *e. g.*, a conveyance in trust to sell, and to pay creditors who are not parties to the arrangement (y); or a post-nuptial settlement upon the settlor's wife, husband, or family (z), unless made in pursuance of a binding (a) ante-nuptial agreement (b), or of a further portion (c), or of an agreement to pay a further portion which is afterwards paid (d), or (on a settlement of the husband's estate) of the wife relinquishing her interests under an existing settlement (e), or her jointure or dower (f) (if married before the late Act came into operation); or mortgaging her separate estate (g), or property over which she has a joint power of appointment (h), to pay his debts; or (on a settlement of the wife's estate) of the husband's relinquishing his estate *in jure mariti* (i): so, if a stranger concur, and provide for payment of the settlor's debts, he will be considered to have purchased the benefit of the settlement for the

(x) *Martin* v. *Martin*, 2 Russ. & M. 507; and there is no exception in favour of the Crown, *semble*; see *Chamley's case*, 2 Rep. 50; *Magdalen College case*, 11 Rep. 66 b.

(y) *Leech* v. *Leech*, 1 Ch. Ca. 249; *Walwyn* v. *Coutts*, 3 Mer. 707; 3 Sim. 14; *Acton* v. *Woodgate*, 2 Myl. & K. 492; *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; *Wilding* v. *Richards*, 1 Coll. 655; *Smith* v. *Keating*, 6 C. B. 136; *Simmonds* v. *Palles*, 2 J. & L. 489; *Mackinnon* v. *Stewart*, 1 Sim. N. R. 76, 89; *Griffith* v. *Ricketts*, 7 Ha. 307; *Smith* v. *Hurst*, 10 Ha. 30: but see *Langton* v. *Tracy*, 2 Ch. R. 16, and Sug. 713; *La Touche* v. *Earl of Lucan*, 7 Cl. & F. 772; *Field* v. *Lord Donoughmore*, 1 Dru. & W. 227; *Glegg* v. *Rees*, L. R. 7 Ch. Ap. 71. See the judgment in *Synnot* v. *Simpson*, 5 H. L. C. 121.

(z) *Evelyn* v. *Templar*, 2 Bro. C. C. 148; *Doe* v. *Roe*, 6 Sco. 525; *Currie* v. *Nind*, 1 Myl. & C. 17, a case of copyhold settled by a married woman during coverture. See, too, as to copyholds being within the Act, *Doe* v. *Bottriell*, 5 B. & Ad. 131.

(a) See 12 Ves. 74; *Doe* v. *Rowe*, 4 Bing. N. C. 737; and see *Wanden* v. *Jones*, 23 Beav. 487; 2 De G. & Jo. 76; *Caton* v. *Caton*, L. R. 2 E. & Ir. Ap. 127; L. R. 1 Ch. Ap. 137; and cases cited, *infrà*, Ch. XVIII., s. 7.

(b) *Griffin* v. *Stanhope*, Cro. Jac. 454; *Randall* v. *Morgan*, 12 Ves. 74; *Ex parte Hall*, 1 Ves. & B. 112; see *Battersbee* v. *Farrington*, 1 Sw. 106.

(c) *Brown* v. *Jones*, 1 Atk. see p. 190; *Stileman* v. *Ashdown*, 2 Atk. 479; *Ramsden* v. *Hylton*, 2 Ves. S. 308.

(d) *Brown* v. *Jones*, *ubi suprà*.

(e) *Ball* v. *Burnford*, Prec. in Ch. 113; *Parker* v. *Carter*, 4 Ha. 409; *Harman* v. *Richards*, 10 Ha. 81; and see *Clerk* v. *Nettleship*, 2 Lev. 148.

(f) See Sug. 718.

(g) *Carter* v. *Hind*, 22 L. T. 116; V.-C. W.

(h) See *Whitbread* v. *Smith*, 3 De G. M. & G. 727, 740.

(i) *Hewison* v. *Negus*, 16 Beav. 594.

settlor's family (k); and, in separation deeds, the covenant usually entered into by the trustees to indemnify the husband against the wife's debts, will as against creditors (l), and also, it is conceived, as against subsequent purchasers, support any further settlement he may make upon her.

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Small unnoticed consideration may support a settlement.

In a recent case where the owner of a valuable Equity of redemption, settled it upon his wife and children at the request of a near relative, and in consideration of a small advance by way of loan, upon the security of his promissory note, to enable him to pay off the arrears of interest on the mortgage debt; the settlement was upheld as against a subsequent mortgagee from the settlor, notwithstanding the inadequacy of the consideration, which was not even mentioned in the deed (m).

So, where husband and wife, jointly seised in fee, mortgaged the estate, limiting the equity of redemption to such uses as they or the survivor should appoint, and the property was reconveyed by their appointment to the use of the wife for life, with remainder to the use of the husband for life, with remainder to uses in favour of their issue, it was held that her concurrence in the settlement made by the reconveyance, was a sufficient consideration to support it against a subsequent purchaser for value from the husband (n).

Post-nuptial settlement may be supported, when.

So, if a post-nuptial settlement be made with the aid of another person whose concurrence is essential to its full validity—as in the case of a settlement by tenant for life and tenant in tail in remainder—this may take from the instrument its voluntary character (o): but the concurrence of the

(k) *Ford* v. *Stuart*, *suprà*, 15 Beav. 493; and see *Townend* v. *Toker*, L.R. 1 Ch. Ap. 446; and see *Bayspoole* v. *Collins*, L. R. 6 Ch. Ap. 228.

(l) See *Stephens* v. *Olive*, 2 Bro. C. C. 90; *Worrall* v. *Jacob*, 3 Mer. 256; but the introduction of such a covenant is not, as has been often supposed, essential; but any other good consideration will be equally effective: see *Frampton* v. *Frampton*, 4 Beav. 294; *Wilson* v. *Wilson*, 14 Sim. 405, affirmed in D. P. 12 Jur. 467; 1 H. L. Ca. 538; 5 H. L. Ca. 40.

(m) *Bayspoole* v. *Collins*, L. R. 6 Ch. Ap. 228.

(n) *Atkinson* v. *Smith*, 3 De G. & Jo. 186; 4 Jur. N. S. 1160.

(o) *Myddleton* v. *Lord Kenyon*, 2 Ves. J. 391; see 410; *Roe* v. *Mitton*,

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Family compromise.

husband in a settlement of the wife's estate has been held not to have this effect when the husband's existing interests are preserved by the settlement (*p*). So, a family compromise founded on a doubtful intestacy is valid (*q*). But, of course, the fact of the grantees having had estates in the property, which—as in the case of estates in remainder on an estate tail—have been destroyed by the settlor, will not support the settlement (*r*).

Purchase in the name of trustees upon voluntary trusts is within the Act.

And the Act extends to a case where A., having contracted to purchase an estate, takes the conveyance in the names of trustees, upon voluntary trusts (*s*).

Whether a voluntary conveyance to a charity may be avoided by a subsequent sale for value.

It is generally said, that where a person has endowed a charity, he cannot afterwards avoid his own act under the 27 Eliz. c. 4, by a sale to a purchaser for value (*t*); but the point does not appear to have been expressly decided. In one case (*u*), a municipal corporation founded a hospital, and procured estates to be conveyed direct from the vendors to the hospital, and it was held that the corporation could not defeat the conveyance by a subsequent sale for value. But, in this case, there never was any estate vested in the corporation. In a later case (*x*), the point was left open; and it must be regarded as still unsettled.

Marriage a sufficient consideration.

Marriage is in itself a sufficient consideration for an antenuptial settlement upon the husband, wife, or issue (*y*): and, in the absence of fraud, the settlement made by one of the

2 Wils. 356; and cases cited in *Doe* v. *Rolfe*, 8 Ad. & E., see p. 659; but see also that case, *infrà*, 898, and *Tarleton* v. *Liddell*, 17 Q. B. 390.

(*p*) *Butterfield* v. *Heath*, 15 Beav. 408; but see *Green* v. *O'Kearney*, 2 Ir. C. L. R. 267; and see, on the general subject, *Scott* v. *Scott*, 18 Jur. 755.

(*q*) *Heap* v. *Tonge*, 9 Ha. 90; see *Stapilton* v. *Stapilton*, 1 Atk. 2; 2 Wh. & T. L. C. 4th edit., 824, and cases there cited; *vide suprà*, 753; *Harman* v. *Richards*, 10 Ha. 81; *Ex parte Lucy*, 17 Jur. 1143; *Stone* v. *Godfrey*, 5 De G. M. & G. 76.

(*r*) *Cormick* v. *Trapaud*, 6 Dow. 60.

(*s*) *Stone* or *Barton* v. *Van Heythuysen*, 11 Ha. 126.

(*t*) See Tudor's Charitable Trusts, 253.

(*u*) *Att.-Gen.* v. *Corporation of Newcastle*, 5 Beav. 307; 12 Cl. & F. 402.

(*x*) *Tyre* v. *Corporation of Gloucester*, 14 Beav. 173.

(*y*) See *Brown* v. *Jones*, 1 Atk. 190; *Nairn* v. *Prowse*, 6 Ves. 752; *O'Gorman* v. *Comyn*, 2 Sch. & L. 147; *Ex parte M'Burnie*, 1 De G. M. & G. 441.

contracting parties is not invalidated, by reason of the settlement made by the other proving ineffective; as, *e.g.*, by reason of his or her infancy; nor does any case of election arise as against the other party or his or her representatives (*z*). Chap. XV. Sect. 5.

Where the marriage is not a valid one.

But a settlement made in pursuance of an agreement entered into in contemplation of a marriage not recognized as valid by the laws of this country—as, *e.g.*, between a man and his deceased wife's sister—cannot (at any rate so far as it is executory (*a*)) be supported (*b*); even as respects a provision thereby made for children of the former legal marriage (*c*). And the same rule, it is conceived, will equally apply, where the marriage, though a *bonâ fide* one, is invalid by reason of one of the parties having contracted a previous marriage which, although not known to be so, is still subsisting. In the case of a settlement executed as part of the arrangements for a marriage within the prohibited degrees, there is not merely the absence of a good consideration, but the presence of that which the Courts necessarily treat as an immoral consideration—*viz.*, an agreement for concubinage instead of coverture. But a voluntary settlement upon the woman herself, if not founded upon any agreement for, although it in fact precedes, a concubinage of this description, and which purports on the face of it to be voluntary, can not be set aside by the settlor or his representatives, if it has been perfected by an actual transfer of the property to the trustees (*d*).

How far the consideration of marriage extends.

A question is frequently raised as to how far the consideration of marriage extends. As against the settlor and his heirs, limitations in favour of collaterals, contained in an ante-nuptial settlement, are binding (*e*); but whether they

(*z*) *Campbell* v. *Ingilby*, 21 Beav. 567; 1 De G. & Jo. 393; see, however, *Codrington* v. *Lindsay*, L. R. 8 Ch. Ap. 578, 593, where election was allowed.

(*a*) *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.

(*b*) *Coulson* v. *Allison*, 2 De G. F. & Jo. 521.

(*c*) *Chapman* v. *Bradley*, 33 Beav. 61.

(*d*) See and consider judgment in *Ayerst* v. *Jenkins*, *ubi suprà*.

(*e*) *Davenport* v. *Bishopp*, 1 Ph.

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will be supported as against subsequent *bonâ fide* purchasers for value has been the subject of frequent discussion.

Limitations in favour of collaterals.

Unnecessary difficulty appears to have been thrown over the cases upon the subject, by a confusion between the contract and the consideration for the contract. The common form of objection is, that collaterals are "not within the consideration of the marriage" (*f*). Now this expression is, it is submitted, scarcely accurate. If A. agreed with B. to pay him 10,000*l.*, in consideration of his conveying his estate to the use of A. for life, with remainders over in favour of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise whether the remaindermen took beneficially, or in trust for A.; but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.'s life estate, were void, upon the ground of the remaindermen not being "within the consideration of the 10,000*l.*" (*g*). In the case of a marriage settlement, the only important questions seem to be, first, whether the collaterals were within the contract: and secondly, whether (if so) there was a sufficient consideration for such a contract.

Such limitations should be considered within marriage contract—when.

Upon the first question, (considered merely as one of principle,) it is submitted, that where the limitations over are in favour of the collateral relations or connections, not of the settlor, but of the other contracting party, (whether wife or husband,) the settlement itself may be considered *primâ facie* evidence of such other party having stipulated for their insertion. So, where, on a settlement of the intended wife's estate, the limitations over are in favour of her own collateral relations, in derogation from the husband's marital right by survivorship, (in case of personalty,) or as tenant by the curtesy (in case of realty). Where, in any

698; *S. C.*, 2 Y. & C. C. C. 451; in which see the earlier cases cited; see, however, an exceptional case of *Wollaston* v. *Tribe*, L. R. 9 Eq. 44, where the settlement in favour of collaterals was set aside.

(*f*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92.

(*g*) And see *Ford* v. *Stuart* 15 Beav. 499.

case, other than that last referred to, the limitations over are in favour of the collateral relations or connections of the settlor, such presumption cannot so readily arise; but it might be proved that the other party stipulated for their insertion. If such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bonâ fide* purchaser.

Nor do the reported cases (*h*), where limitations in a marriage settlement in favour of collaterals have been held invalid, appear to be inconsistent with the above suggestions.

Clarke v. *Wright.*

In a late case in the Exchequer Chamber (*i*), a settlement by a woman out of her own estate, made previously to her marriage, in favour of her illegitimate child, was supported as against a subsequent mortgagee from her husband and herself. One of the learned judges (*k*), after citing the above remarks, was of opinion that the principle there suggested was the only one which could reconcile the conflicting decisions; and added, that though it is to be presumed that the wife and her friends stipulate only for the limitations in favour of the husband, wife, and issue of the marriage, yet where, as in *Newstead* v. *Searles* (*l*), and *Clayton* v. *Lord Wilton* (*m*), the limitations so far interfere with those which would naturally be made in favour of the husband, wife, and issue, as to indicate that the limitations must have been discussed, and made part of the marriage

(*h*) See *Osgood* v. *Strode*, 2 P. Wms. 245; *Sutton* v. *Chetwynd*, 3 Mer. 249, 253; *Johnson* v. *Legard*, 3 Madd. 283; 1 Turn. & R. 281; *Cotterell* v. *Homer*, 13 Sim. 506; *Stacpoole* v. *Stacpoole*, 2 Con. & L. 489; and see *Kekewich* v. *Manning*, 1 De G. M. & G. 176; see also *Cramer* v. *Moore*, 3 Sm. & G. 141, where it was held that the wife, having survived her husband, was not bound by his covenant contained in marriage articles for the settlement of her reversionary property; no settlement having been executed, and the only persons who could derive any benefit from enforcing the covenant being her next of kin.

(*i*) *Clarke* v. *Wright*, 6 Hur. & Nor. 849; 7 Jur. N. S. 1032.

(*k*) Justice Blackburn, with whom Justice Willes concurred.

(*l*) 1 Atk. 265.

(*m*) 3 Madd. 302.

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contract, and part of the reciprocal considerations between the husband and the wife, that presumption is rebutted, and the limitations are not voluntary. Two of the other judges (*n*), were of opinion that, with two exceptions, the rule was well established that a limitation in a marriage settlement in favour of the relations of the settlor, other than the issue of the marriage, is not within the consideration of the marriage:—one of these exceptions being, that a limitation may be introduced in favour of the children of a former marriage (*o*); and the other, that a similar limitation may be made in favour of the settlor's issue by a future wife, in default of issue of the intended marriage (*p*); and held that the illegitimacy of the child in the case before them did not take it out of the principle of the former exception. The judge (*q*) who formed the minority was of opinion that *Newstead* v. *Searles* was decided before the principles of law applicable to the subject were well understood, and was no longer a binding authority.

Remarks on this case.

In *Clarke* v. *Wright* there was no proof that the husband had stipulated for the provision in favour of the settlor's illegitimate child; nor could this be presumed from the form of the limitations. The child was to take only *after* the husband's life estate had determined, nor did the settlement in any way derogate from the marital right by survivorship; and the only reasonable presumption was that the stipulation emanated from the settlor herself. The facts, therefore, do not seem to justify the inference on which two of the learned judges relied, *viz.*, that the limitation in favour of the child was stipulated for by the husband; and, unless there is a recognized exception to the general rule, where the limitation is in favour of the settlor's own issue by a former marriage, the provision for the child was purely

(*n*) C. J. Cockburn and Justice Wightman, who agreed that the judgment of the Court below should be affirmed, though on different grounds from Blackburn and Willes, JJ.

(*o*) *Newstead* v. *Searles*, 1 Atk. 265; but query whether the same principle applies where the husband is the settlor.

(*p*) *Clayton* v. *Lord Wilton*, 3 Madd. 302.

(*q*) Justice Williams.

voluntary, and void as against a subsequent *bonâ fide* purchaser. In *Newstead* v. *Searles* (r), there appear to have been reciprocal considerations both on the part of the husband and the wife; but the main ground of Lord Hardwicke's decision was that, if he laid down any other rule, it would become impossible for a widow, on her second marriage, to make any certain provision for her issue by a former one. The same reason, of course, does not apply where the husband, on his second marriage, makes a settlement which embraces his issue by a former wife; and, it may be doubted whether such a case falls within the exception. In *Clayton* v. *Lord Wilton*, the limitation in favour of the settlor's issue by any future wife was upheld, because, from the manner in which it was introduced into the settlement, such a construction was necessary, in order to support a limitation in favour of children of the intended marriage; and it cannot be regarded as an authority that a limitation, in a marriage settlement, in favour of issue by any future marriage, whether of husband or wife, will in every case be supported as against a subsequent *bonâ fide* purchaser (s).

In a modern case, where a woman being indebted, though not to the extent of insolvency, at the time of her marriage, settled all her real and personal property (with a trifling exception) upon herself for life, with remainder to the children of the marriage, and, in default of children, in favour of certain collateral relatives, including a favourite niece whom she had adopted as her daughter, and, having survived her husband, died without having had issue and leaving no assets, it was held that the settlement, *quoad* the collaterals, was voluntary, and must be set aside to the extent of the settlor's indebtedness (t).

If within contract, marriage

As to the second point—If upon marriage the husband's estate were settled upon the wife, giving her an absolute

(r) 1 Atk. 264, 267; and see Sug. 717.

(s) See Lord St. Leonards' comments, Sug. 716, note.

(t) *Smith* v. *Cherrill*, L. R. 4 Eq. 390.

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forms sufficient consideration to support them, *semble.*

power of sale and control over the purchase-money, effectually excluding him from any future participation therein, and without securing to him the indirect advantage of a permanent provision for her, the marriage, it is conceived, would clearly be a sufficient consideration for such a settlement; although she might at once sell the estate and hand over the purchase-money to her own relations: and, if so, upon what principle can it be contended that the marriage would not equally have been a sufficient consideration for any limitations in favour of such relations, which might, upon her stipulation, have been introduced into the settlement? The case of a woman marrying, and stipulating for a provision in favour of parents, or others, who had previously been dependent on her exertions for support, may suggest the hardships which might result from maintaining a contrary doctrine. The impossibility of restoring the consideration by replacing either party in his or her original *status* is, in itself, a sufficient reason why full effect should be given to any arrangements which were considered to form the equivalent, or part of the equivalent, to such consideration (*u*).

Such limitations supported by necessary concurrence of third person in settlement;

And where the settlement is made by aid of a party other than the husband and wife,—as where, on the marriage of tenant in tail, the tenant for life in possession concurs in barring the entail and re-settling the estate,—the validity of limitations in favour of other branches of the family, or (it is conceived) of strangers, seems to be unquestionable (*x*): so, even the mother of the husband releasing the lands from an annuity, and accepting a substituted security for its payment, has been held a sufficient consideration for limitations

(*u*) See *Jenkins* v. *Keymes* or *Keymis*, 1 Lev. 237, where it was held that the wife's marriage portion was a sufficient consideration for limitations to the issue of the husband by a second marriage. And see *Heap* v. *Tonge*, 9 Ha. 104; *Ford* v. *Stuart*, 15 Beav. 500.

(*x*) See *Jenkins* v. *Keymes* or *Keymis*, 1 Lev. 150, 237; *Osgood* v. *Strode*, 2 P. Wms. see p. 256; and *Pulvertoft* v. *Pulvertoft*, 18 Ves. 92. But see *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; where, however, the Court considered that the settlor intended to reserve to herself a power of appointment among the collaterals who were the objects of the ultimate trust.

in favour of her younger children (*y*). A settlement, not on marriage, by tenant for life and tenant in tail, was, under special circumstances, held void as against a purchaser in a modern case (*z*); but the decision seems to be disapproved of by Lord St. Leonards (*a*).

or by being prior to limitations to issue of marriage.

And limitations to collaterals, which precede a limitation in favour of issue of the marriage, will, it seems, be valid (*b*): so, the remoteness of a limitation (*c*), or its being subsequent to a vested estate tail (*d*), may perhaps be sufficient to sustain it.

Settlement by widow, valid.

And a settlement by a widow, before her second marriage, upon her children by a deceased husband, is not fraudulent within the Act: even although they are themselves married and have issue (*e*): and the husband is not a purchaser within the Act (*f*). So, a settlement by a woman upon her marriage, in favour of her illegitimate issue, may be supported, as against a subsequent purchaser from her and her husband (*g*).

Marriage settlement may be shown to be fraudulent.

But even a settlement in consideration of marriage may be shown to have been executed by all parties for the purpose of defrauding creditors, and therefore to be void as against creditors (*h*); as where a man, on marrying a woman with whom he had cohabited for several years, executed an ante-nuptial settlement for the sole purpose of defeating his creditors, the wife being implicated in the fraud (*i*). And

(*y*) *Roe* v. *Mitton*, 2 Wils. 356.

(*z*) *Doe* v. *Rolfe*, 8 Ad. & E. 650; and see *Tarleton* v. *Liddell*, 17 Q. B. 390; 4 De G. & Sm. 538; *Wakefield* v. *Gibbon*, 1 Giff. 401.

(*a*) Sug. 716.

(*b*) *Clayton* v. *Earl Wilton*, 3 Madd. 302, n.; and see Sug. 716; and *vide supra*, p. 896.

(*c*) 2 P. Wms. 255.

(*d*) See Sug. 716; *Lord Tenham's case*, 2 Lev. 105.

(*e*) *Newstead* v. *Searles*, 1 Atk. 265; and see *King* v. *Cotton*, 2 P. Wms. 674; *Doe* v. *Lewis*, 11 C. B. 1035.

(*f*) *S. C.*

(*g*) *Clarke* v. *Wright*, 6 H. & N. 849; 7 Jur. N. S. 1332; and *vide suprà*, p. 895.

(*h*) *Columbine* v. *Penhall*, 1 Sm. & G. 228.

(*i*) *Bulmer* v. *Hunter*, L. R. 8 Eq. 46; and see *Acraman* v. *Corbett*, 1 J. & H. 410.

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where such is the object of the deed, the fact of the marriage being solemnized in pursuance of a long-standing engagement will not validate the settlement (*k*).

Bonâ fide settlement by indebted settlor.

Where A., being indebted, but not to the extent of insolvency, applied to his mother for a loan, which she consented to make, and in fact made, only on condition that he settled his landed property, the settlement was upheld (*l*); but the transaction was *bonâ fide*, and there was no intention to defraud creditors. So, where the owner of a freehold estate worth, beyond a mortgage upon it, about 1,300*l.*, at the solicitation of a relative who, as an inducement, lent him 150*l.* on his promissory note, made a post-nuptial settlement of it on his wife and children, which did not disclose the advance or any other valuable consideration, the settlement was upheld as against a subsequent mortgagee from the settlor (*m*).

Unspecified consideration.

Where a settlement is expressed to be made in consideration of 5*s.*, and for divers other good and valuable, but unstated, considerations, it rests with the party setting up the settlement to show their actual existence (*n*).

Consideration not expressed

A settlement or conveyance, apparently voluntary (*o*),

(*k*) *Fraser* v. *Thompson*, 4 De G. & Jo. 659.

(*l*) *Thompson* v. *Webster*, 4 De G. & Jo. 600; 7 Jur. N. S. 531, and *vide suprà*, p. 897, and comments on *Thompson* v. *Webster*, in *Smith* v. *Cherrill*, L. R. 4 Eq. 390.

(*m*) *Bayspoole* v. *Collins*, L. R. 6 Ch. Ap. 228.

(*n*) *Kelson* v. *Kelson*, 17 Jur. 129, V.-C. W., 10 Ha. 395.

(*o*) As to when a voluntary settlement cannot be enforced by the apparent beneficiaries, see *Ward* v. *Audland*, 8 Beav. 201, and cases collected in reporter's note, 213; also *Searle* v. *Law*, 15 Sim. 95; *Bridge* v. *Bridge*, 16 Beav. 315; *Gilbert* v. *Overton*, 2 H. & M. 110; see judgment; *Price* v. *Price*, 1 De G. M. & G. 308; *Beech* v. *Keep*, 18 Beav. 285; *Sewell* v. *Moxsy*, 2 Sim. N. R. 189; *Cox* v. *Barnard*, 8 Ha. 310; *Jones* v. *Lock*, L. R. 1 Ch. Ap. 25: *et contrà*; *Ellison* v. *Ellison*, 6 Ves. 656; 1 Wh.& Tu. L. C. 4th ed. 245, and cases cited in note; *Sloane* v. *Cadogan*, Sug. 719; *Fortescue* v. *Barnett*, 3 Myl. & K. 36; *Wheatley* v. *Purr*, 1 Ke. 551; and *Blakely* v. *Brady*, 2 Dru. & Wal. 311; *Beatson* v. *Beatson*, 12 Sim. 281; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Voyle* v. *Hughes*, 2 Sm. & G. 18; *Donaldson* v. *Donaldson*, Kay, 711; *Dening* v. *Ware*, 22 Beav. 184: and see *Airey* v. *Hall*, 3 Sm. & G. 315, and *Kiddill* v. *Farnell*, *ibid.*, 428; where the stock, the subject of set-

may be supported by any evidence, (consistent with its terms,) which proves that it was in fact made for good consideration (*p*): so, although originally voluntary, it may be made good by subsequent matter, in the hands of those who have given value on the faith of it; *e.g.*, the marriage of the party claiming under it beneficially (*q*)—even although its existence be not shown to have been considered in the marriage treaty (*r*),—or a sale or mortgage, for valuable consideration, by the voluntary grantee (*s*); or, probably, (in the case of a creditor's deed,) the fact of creditors having, upon the faith of it, refrained to enforce their remedies against the debtor (*t*), may be sufficient to support the deed.

may be proved. Settlement may be supported by matter *ex post facto*.

Distinction between creditors' deeds, and other trust deeds.

The distinction between deeds vesting property in trustees upon trust for the benefit of particular persons,—which deeds cannot be revoked, altered, or modified by the party who has created the trust;—and deeds purporting to be executed for the benefit of creditors,—where the question

tlement, had not been actually transferred at the settlor's death; *Debrow* v. *Bone*, 8 Jur. N. S. 276; *Richardson* v. *Richardson*, L. R. 3 Eq. 686; where the promissory notes comprised in the deed were never indorsed over; *Re Way's Trusts*, 2 De G. Jo. & S. 365; where the settlor retained the deed which was never acted on, or communicated to the volunteers or the trustees, and afterwards destroyed it, and yet it was held to be an effectual disposition of the fund; compare *Hall* v. *Hall*, L. R. 14 Eq. 365.

(*p*) See *Ferrars* v. *Cherry*, 2 Vern. 384; *Pott* v. *Todhunter*, 2 Coll. 76; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; *Harman* v. *Richards*, 10 Ha. 81; *Bayspoole* v. *Collins*, L. R. 6 Ch. Ap. 228; and see as to connecting deeds, as being parts of one transaction, *S. C.*, and *Ford* v. *Stuart*, 15 Beav. 493; *Whitbread* v. *Smith*, 3 De G. M. & G. 727; *Pryor* v. *Pryor*, 11 W. R. 873, 12 W. R. 781.

(*q*) *Kirk* v. *Clark*, Prec. in Ch. 275; *East India Company* v. *Clavel*, 2 Eq. Ca. Abr. 52, and other cases cited, 5 Bac. Abr. tit. Fraud. C.; *Johnson* v. *Legard*, Turn. & Russ. 294; *Payne* v. *Mortimer*, 1 Giff. 118; 4 De G. & Jo. 447.

(*r*) See *Brown* v. *Carter*, 5 Ves. 862, see p. 876; see *Roddy* v. *Williams*, 3 J. & L. 1, 17.

(*s*) *Prodgers* v. *Langham*, 1 Sid. see 134; *George* v. *Milbanke*, 9 Ves. 190; and see *Parr* v. *Eliason*, 1 East, 92, 95.

(*t*) See *Acton* v. *Woodgate*, 2 Myl. & K. 492; *Hinde* v. *Blake*, 3 Beav. 234; *Kirwan* v. *Daniel*, 5 Ha. 493; *Johnson* v. *Kershaw*, 1 De G. & S. 260; *Harland* v. *Binks*, 15 Q. B. 713; *Mackinnon* v. *Stewart*, 1 Sim. N. R. 76; *Griffith* v. *Ricketts*, 7 Ha. 307; *Smith* v. *Hurst*, 10 Ha. 30, 46; *Synnot* v. *Simpson*, 5 H. L. C. 121; *Siggers* v. *Evans*, 1 Jur. N. S. 851, Q. B.; but see also *Cornthwaite* v. *Frith*, 4 De G. & S. 552; *Nicholson* v. *Tutin*, 2 K. & Jo. 18; 3 K. & Jo. 159.

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whether the trusts can be revoked, altered, or modified, depends upon the circumstances of each particular case—has been laid down as follows; *viz.*,—In cases of trust for the benefit of particular persons the party creating the trust can have no other object than to benefit the persons in whose favour the trust is created; and, the trust being well created, the property in Equity belongs to the *cestuis que trust* as much as it would belong to them at Law, if the legal interest had been transferred to them. But in cases of deeds purporting to be executed for the benefit of creditors, and to which no creditor is a party, the motive of the party executing the deed may have been, either to benefit his creditors, or to promote his own convenience; and the Court there has to examine into the circumstances, for the purpose of ascertaining what was the true purpose of the deed: and this examination does not stop with the deed itself, but must be carried on to what has subsequently occurred; because the party who has created the trust may, by his own conduct, or by the obligations which he has permitted his trustee to contract, have created an equity against himself (*u*).

Whether heir or devisee can set aside voluntary or fraudulent deed.

A settlement "really fraudulent or fraudulently kept on foot" (*x*), would seem to be void as against a *bonâ fide* purchaser even from the heir or devisee of the settlor (*y*); but a merely voluntary deed cannot, it would appear, be avoided by a sale by the heir or devisee; the principle upon which a sale by the settlor himself avoids such a deed being, that the subsequent sale shows the existence of an originally fraudulent intention (*z*): so, a wife, surviving her husband, cannot, by an assignment for value, avoid his voluntary assignment of her legal term for years (*a*). Of course, a voluntary deed will not be avoided by a subsequent convey-

(*u*) By Sir G. Turner, *Smith* v. *Hurst*, 10 Ha. 47.

(*x*) Sug. 713.

(*y*) *Burrel's case*, 6 Rep. 72; and see *Warburton* v. *Loveland*, 6 Bli. N. S. 1, 31.

(*z*) *Parker* v. *Carter*, 4 Ha. 409; *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 Kay & Jo. 132, 150.

(*a*) *Doe* v. *Lewis*. 11 C. B. 1035.

ance apparently made for value, but in fact voluntary (*b*). It has been held in Ireland that in the case of several voluntary grantees of the same estate, the one who first sells confers a good title on the purchaser (*c*): but this seems to be bad law (*d*).

Settlements with power of revocation are within the Act.

The 5th sect. of 27 Eliz. c. 4, seems to comprise all settlements, although made for valuable consideration (*e*), which reserve what is, either expressly or virtually, a power of revocation to the settlor; *e. g*, an unlimited power to charge by way of mortgage (*f*); or a power to revoke on payment of 10s. (*g*), or with the consent of a person nominated by the settlor (*h*), or, simply, at a future date (*i*): but a power to charge a reasonable specified sum (*k*), or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties interested under the limitations (*l*), seems to be unobjectionable. Lord St. Leonards expresses an opinion (*m*), that where a settlement made for valuable consideration contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settlement: probably the result might be the same, although there were no consideration for the release, if the purchaser had notice of it: but a secret release will not affect a purchaser (*n*).

Power of revocation should be expressly reserved, where so intended.

We may remark here that a solicitor, when preparing a voluntary settlement, ought to ascertain from his client whether it is to be revocable or not; and where it is

(*b*) *Roberts* v. *Williams*, 4 Ha. 130; *Humphreys* v. *Pensam*, 1 M. & C. 580; *Doe* v. *Webber*, 1 A. & E. 733, 740.

(*c*) *Moffett* v. *Whittaker*, 1 Long. & Town. 141.

(*d*) *Doe* v. *Rusham*, 17 Q. B. 723.

(*e*) See Sug. 721; *Smith* v. *Hurst*, 10 Ha. 30.

(*f*) *Tarback* v. *Marbury*, 2 Vern. 510.

(*g*) See *Griffin* v. *Stanhope*, Cro. Jac. 455.

(*h*) *Twyne's case*, 3 Rep. 82 b.; 1 Smith's Leading Cases, 1.

(*i*) See *Anon*, cited Moo. 618; *S. C*, cited 3 Rep. 82*b*; but it seems that the title under the settlement will be valid until the specified time arrives.

(*k*) *Jenkins* v. *Keymes* or *Keymis*, 1 Lev. 150.

(*l*) See *Doe* v. *Martin*, 4 T. R. 39; Sug. 721.

(*m*) Sug. 723.

(*n*) *Bullock* v. *Thorne*, Moo. 615.

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intended to be of a *quasi* testamentary character, a power of appointment which will override the trusts, or a power of revocation, should be expressly reserved (*o*). In several cases voluntary settlements, apparently irrevocable, have either been treated as revocable (*p*), or have been rectified by the introduction of a power of general appointment (*q*): but where the intention to make an irrevocable settlement is clear, the Court will not interfere, merely because the deed is voluntary (*r*).

Personal settlements not within 27 Eliz.

We may here remark that the 27 Eliz. does not affect settlements of personal chattels (*s*).

Purchaser with notice buying from vendor without notice, protected;—when.

A purchaser will not be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bonâ fide* without notice (*t*). It has been held that, in the case of a charitable trust, want of notice, in order to be effectual, must have existed on the part of the *first* purchaser who held adversely to the trust; and that, if he bought with notice, the want of notice in any subsequent purchaser is immaterial (*u*). This is a doctrine which the Courts would probably be unwilling to countenance. But no length of possession will, irrespectively of the Statute of Limitations, protect a purchaser buying with notice of the charitable trust (*x*). If trust-property which has been improperly sold

(*o*) *Anderson* v. *Elsworth*, 3 Giff. 154; 7 Jur. N. S. 1047; *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Everitt* v. *Everitt*, L. R. 10 Eq. 405. The onus of showing that the gift was intended to be irrevocable is thrown on the party claiming it; *Coutts* v. *Acworth ubi suprà;* and see *Wollaston* v. *Tribe*, L. R. 9 Eq. 44; but see *Phillips* v. *Munnings*, L. R. 7 Ch. Ap. 244.

(*p*) See *Hall* v. *Hall*, L. R. 14 Eq. 365, where a voluntary settlement of real estate, which did not contain any power of revocation, was set aside after the lapse of nearly twenty years.

(*q*) *Harbidge* v. *Wogan*, 5 Ha. 258; *Nanney* v. *Williams*, 22 Beav. 452; *Forshaw* v. *Welsby*, 7 Jur. N. S. 299; 30 Beav. 243.

(*r*) *Phillips* v. *Munnings*, L. R. 7 Ch. Ap. 244.

(*s*) *Stone* v. *Van Heythuysen*, 11 Ha. 126.

(*t*) See *Brandlyn* v. *Ord*, 1 Atk. 571, and *Lowther* v. *Carlton*, 2 Atk. 242; *Sweet* v. *Southcote*, 2 Bro. C. C. 66.

(*u*) See *East Greensted's case*, Duke's Ch. Uses, 640, A. D. 1633; and see *Sutton Coldfield case*, *ib.* 68; and *Commissioners of Charitable Donations* v. *Wybrants*, 2 J. & L. 194; Tudor's Charitable Trusts, 332, 333.

(*x*) *Suprà*, p. 382.

finds its way back to the trustee, it becomes re-impressed with the trust, notwithstanding any want of notice on the part of intervening purchasers (y).

Settlements to defraud creditors, void under 13 Eliz. c. 5.

By the 13th Eliz. c. 5 (made perpetual by the 29th Eliz. c. 5), conveyances made of fraud, to the intent to delay, hinder, or defraud creditors (z), are declared to be void: but the Act is not to extend to conveyances made upon good consideration and *bonâ fide* to persons without notice of the intended fraud (a): but the mere fact of a settlement being voluntary is not enough to render it void against creditors (b); nor, on the other hand, is a good consideration sufficient to support it, if the intention be to defraud creditors (c); though the existence of a valuable consideration is a circumstance in favour of the validity of the deed (d): nor is the fact of the deed being executed under pressure on the eve of bankruptcy sufficient to uphold it, if it is, in effect, an assignment of the debtor's solvency (e). Nor is the absence of any fraudulent intention on the part of the debtor, or the fact that the settlement was procured from him by the fraud of others, sufficient to uphold the deed, if the effect of the transaction is to defeat the claims of creditors (f). A surety is no more justified in placing his property out of the reach of liability for the debt than if he were the principal debtor (g).

(y) *Kennedy* v. *Daly*, 1 Sch. & L.; see p. 379.

(z) *Vide infrà*, p. 906.

(a) Sect. 6; see *Wood* v. *Dixie*, 7 Q. B. 892; *Columbine* v. *Penhall*, 1 Sm. & G. 228; *Penhall* v. *Elwin*, 1 Sm. & G. 258; *Ex parte Burnie*, 1 De G. M. & G. 441; *Marlow* v. *Orgill*, 8 Jur. N. S. 789, 829; *Darvill* v. *Perry*, 6 H. & N. 807; and see, on the general construction of the statute, *Twyne's case*, 3 Rep. 80; 1 Smith's Leading Cases, 1, and cases cited in note; and *Skarf* v. *Soulby*, 1 Mac. & G. 364, and cases cited; *Townsend* v. *Westacott*, 2 Beav. 340; *Goldsmith* v. *Russell*, 5 De G. M. & G. 547; *Christy* v. *Courtenay*, 13 Beav. 97; *French* v. *French*, 2 Jur. N. S. 169; 6 De G. M. & G. 95; *Neale* v. *Day*, 4 Jur. N. S. 1225; *Acraman* v. *Corbett*, 1 J. & H. 410; *Thompson* v. *Webster*, 7 Jur. N. S. 531; and see, as to settlements, *pendente lite*, *Blenkinsopp* v. *Blenkinsopp*, 12 Beav. 568; 1 De G. M. & G. 495.

(b) *Holmes* v. *Penney*, 5 W. R. 132; 3 Jur. N. S. 80; 3 K. & Jo. 90, 99.

(c) *Bott* v. *Smith*, 21 Beav. 511.

(d) *Holmes* v. *Penney*, *ubi suprà*.

(e) *Goodricke* v. *Taylor*, 2 H. & M. 380; 2 De G. Jo. & S. 135.

(f) *Cornish* v. *Clark*, L. R. 14 Eq. 184.

(g) *Goodricke* v. *Taylor*, *ubi suprà*.

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The fact that the settlor at the date of the settlement was largely engaged in speculative transactions (*h*), or was about to engage in a hazardous business (*i*), is of course strong evidence that, notwithstanding his apparent solvency, the real intention of the settlor was to place the property beyond the reach of his creditors; and the fact that he has already made provision for the objects of the settlement may not be immaterial in estimating the *bona fides* of the transaction (*k*).

What property is within it.

It has been repeatedly held that an assignment of property incapable of being taken in execution, is not, within the words of the Statute, an assignment with intent to delay creditors (*l*). Thus, copyholds, and money and securities for money were not within the original scope of the Act (*m*); and it was considered a doubtful point whether a person largely indebted might not purchase and settle property, which his creditors, in the absence of direct fraud, would be unable to follow (*n*). Now, however, by the 1 & 2 Vict. c. 110, copyholds may be taken in execution under a writ of *elegit*, and money, bank notes and securities for money under a writ of *fi. fa.* (*o*). Since this extension of the law of judgments, a voluntary purchase of stock, by a person largely indebted, in the names of trustees, upon trust for the benefit of his children, has been held fraudulent within the Act (*p*); so, also, an assignment by a person *in extremis* of a policy on his life (*q*).

Tests of validity.

The simple test to be applied in each case is, whether the transaction is *bonâ fide*, or a mere contrivance for the personal

(*h*) *Crossley* v. *Elworthy*, L. R. 12 Eq. 158.

(*i*) *Mackay* v. *Douglas*, L. R. 14 Eq. 106.

(*k*) *Crossley* v. *Elworthy*, *ubi suprà*.

(*l*) *Rider* v. *Kidder*, 10 Ves. 360; and see *Barrack* v. *M'Culloch*, 3 K. & Jo. 110, and cases there cited and judgment.

(*m*) See *Mathews* v. *Fraser*, 1 Cox, 278.

(*n*) *Fletcher* v. *Sedley*, 2 Vern. 490; but see *Stone* v. *Van Heythuysen*, 11 Ha. 126; Sugd. 706; and see judgment in *Neale* v. *Day*, 4 Jur. N. S. 1225.

(*o*) See sections 11 and 12.

(*p*) *Barrack* v. *M'Culloch*, 3 K. & Jo. 110.

(*q*) *Stokes* v. *Cowan*, 29 Beav. 637; as to policies of insurance being securities for money within the 1 & 2 Vict. c. 110, sect. 12, see *Law* v. *The Indisputable Life Assurance Company*, 1 K. & Jo. 223; *Robson* v. *M'Creight*, 25 Beav. 272.

benefit of the settlor, or of others whom he wishes improperly to favour. Thus, an ordinary creditor's deed is not within the Act (r); unless it be so framed that a creditor, willing to take his fair share of the property, cannot reasonably be expected to accede to it (s). So, where a trader debtor, knowing that a writ of sequestration was about to be issued against him, vested the whole of his property in trustees for the benefit of certain of his creditors, and the deed contained a proviso that he should remain in possession for six months, and that if any sequestration should be enforced his possession was to cease, it was held that the deed, although an act of bankruptcy, if any of the excluded creditors had filed a petition upon it, was not void under the 13th Eliz. c. 5 (t). Where, as in the case just cited, the transaction is in the nature of a mortgage, retention of possession by the grantor until default is made is no evidence of fraud; but it is otherwise where the possession is retained after what purports to be an absolute conveyance of the property (u); though, even in this case, the presumption of fraud may be rebutted (x).

Tarleton v. Liddell.

Where a recovery was suffered by A., tenant for life, and B., his son, tenant in tail in remainder, and by the deed leading the uses of the recovery, A.'s life estate was limited to B., in order to defraud A.'s creditors, and, subject thereto, the property was settled on B. for life, with remainder to his first and other sons in tail, but B. was not privy to the fraud, it was held that the recovery was good, and that the deed leading the uses was bad; so that A.'s life estate passed to his assignees in a subsequent bankruptcy, and subject thereto, B. became entitled in fee simple (y). A voluntary conveyance with the intention of depriving the plaintiff in an action of

(r) *James* v. *Whitbread*, 11 C. B. 406.

(s) *Owen* v. *Body*, 5 Ad. & E. 28; see 20 L. J. C. B. 220; and *Holt* v. *Kelly*, 13 Ir. L. R. 83, Q. B.

(t) *Alton* v. *Harrison*, L. R. 4 Ch. Ap. 622.

(u) See *Edwards* v. *Harben*, 2 T. R. 587.

(x) *Latimer* v. *Batson*, 4 B. & C. 652.

(y) *Tarleton* v. *Liddell*, 17 Q. B. 390; 4 De G. & S. 538; *Wakefield* v. *Gibbon*, 1 Giff. 401.

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the fruits of his verdict has been held to be void (z); so, also, where the object of the deed was to defeat proceedings under a winding up order (a). But a conveyance, pending an action or judgment, is not necessarily void if supported by a valuable consideration (b).

Who may impeach.

It has been held that a conveyance can be set aside as fraudulent against creditors only at the instance of a person who was a creditor at the time; though, when it shall have been set aside, subsequent creditors may be let in (c): but the former branch of the proposition cannot now be relied on (d); except perhaps in cases where all debts due at the date of the deed have been paid, and there is no evidence of an intention to defraud future creditors (e); or in cases where the deed is impeached only on account of the presumption of fraud which arises from its being voluntary (f). The whole subject was fully considered in the case of *Spirett* v. *Willows* (g); in which Lord Westbury, after remarking on the inconsistency of the authorities, expressed his opinion that the following conclusions were well founded:—"If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that his remedy is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was, or was not, solvent, after making the settlement (h); but if a voluntary settlement, or deed of gift, be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is

(z) *Barling* v. *Bishopp*, 29 Beav. 417.

(a) *Reese River Silver Mining Company* v. *Atwell*, L. R. 7 Eq. 347.

(b) See *Marlow* v. *Orgill*, 8 Jur. N. S. 789, 829; *Darvill* v. *Perry*, 6 Hurl. & N. 807.

(c) *Per* V.-C. K. B., *Ede* v. *Knowles*, 2 Y. & C. C. C. 178; see *Re Magauley's Trust*, 5 De G. & S. 1; *Stone* v. *Van Heythuysen*, 11 Ha. 126, 133; *Strong* v. *Strong*, 18 Beav. 408.

(d) See *Stone* v. *Van Heythuysen*, 11 Ha. 124; *Graham* v. *Furber*, 14 C. B. 410; *Jenkin* v. *Vaughan*, 3 Dr. 419; *Crossley* v. *Elworthy*, L. R. 12 Eq. 158; *Mackay* v. *Douglas*, L. R., 14 Eq. 106; and *vide infrà*.

(e) See 3 Dr. 425.

(f) *Holmes* v. *Penney*, 3 K. & J. 90, 99.

(g) *Spirett* v. *Willows*, 11 Jur. N. S. 70; 3 De G. J. & S. 293.

(h) See, however, as to this *dictum*, *Freeman* v. *Pope*, L. R. 5 Ch. Ap. 538; L. R. 9 Eq. 206.

necessary to show, either that the settlor made the settlement with express intent to delay, hinder, or defraud creditors, or that, after the settlement, he had not sufficient means or reasonable expectation of being able to pay his then existing debts—that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is, therefore, fraudulent and void." And in a later case (*i*), where a trader settled all his property, present as well as future, reserving to himself the control over his stock in trade, and continued to trade, the settlement was held to be void as against his creditors, although he did not appear to have been indebted at the date of its execution.

Remarks on *Spirett* v. *Willows*.

The dicta of Lord Westbury in the case of *Spirett* v. *Willows* have not met with unqualified approval (*k*); and, if taken as abstract propositions of law, are stated somewhat too broadly. The mere circumstance that the debt of the creditor impeaching the deed was existing at the date of the settlement will not of itself entitle him to relief against it, unless from all the circumstances an intention to defraud creditors must be presumed. Actual proof of an express fraudulent intention is not required, except, it has been said, in cases where the settlement sought to be set aside is founded on a valuable consideration (*l*); and even in these cases, it is submitted, the difference consists not so much in the nature of the proof required, as in the degree of its cogency—the fact of a valuable consideration of itself rebutting any *primâ facie* presumption of fraud.

Person who has assisted in preparing a voluntary deed may not claim adversely to it.

It was held, by an eminent Judge, that a person who has assisted in the preparation and carrying out of a voluntary deed, is not thereby necessarily precluded from enforcing his claim adversely to it, as a creditor of the settlor; but this was

(*i*) *Ware* v. *Gardner*, L. R. 7 Eq. 317.

(*k*) *Freeman* v. *Pope*, L. R. 5 Ch. Ap. 538; L. R. 9 Eq. 206; and see *Kent* v. *Riley*, L. R. 14 Eq. 190.

(*l*) See judgment of L. J. Giffard, in *Freeman* v. *Pope*, *ubi suprà*.

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reversed on appeal (*m*). It has also been decided that an indictment will lie against both the grantor and grantee in a fraudulent deed (*n*); and therefore where a bill is filled to set aside a deed as fraudulent under the Statute, a defendant who is a party to the deed, either as grantor or grantee, may decline to answer the interrogatories (*o*).

How voluntary settlements by traders may be avoided under the new Bankruptcy Act.

The Bankruptcy Act of 1869 (*p*) has introduced several important provisions with reference to the avoidance of voluntary settlements. By the 91st section, any settlement of property made by a *trader* (*q*) (not being a settlement made before and in consideration of marriage, or in favour of a *bonâ fide* purchaser or incumbrancer for value, or a settlement, made on or for the wife or children of the settlor, of property, which has accrued to him after marriage in right of his wife), is made void as against his trustee under the Act, if he becomes bankrupt within two years after the date of the settlement; and if he becomes bankrupt at any subsequent time within ten years from such date, then it is also to be void, unless the parties claiming under it can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement: and any covenant, or contract made by a trader in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not, at the date of the marriage, any estate or interest whether vested, or contingent, in possession, or remainder, and not being money or property in right of his wife, is made void as against his trustee under the Act, in the event of his becoming bankrupt before such property or money has been actually transferred or paid, pursuant to such contract or covenant; and the word "settlement" is for the purposes of this section to include any conveyance or transfer of property.

(*m*) *Olliver* v. *King*, 1 Jur. N. S. 1066, V.-C. W.; reversed 4 W. R. 382; 2 Jur. N. S. 312; 8 De G. M. & G. 110.

(*n*) *Reg.* v. *Smith*, 6 Cox, C. C. 31.

(*o*) *Wych* v. *Parker*, 22 Beav. 59.

(*p*) 32 & 33 Vict. c. 71.

(*q*) As to who is a trader within the Act, see Sched. I.

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Under the 92nd section.

By the 92nd section, every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due, from his own moneys, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, is to be deemed fraudulent and void under the Act, in the event of the person making, taking, paying, or suffering the same becoming bankrupt within three months after the date of making, taking, paying, or suffering the same; but the section is not to affect the rights of a purchaser, payee, or incumbrancer in good faith, and for valuable consideration: and, by the 94th and 95th sections, certain transactions with the bankrupt, or in relation to his property, are protected from the operation of the Statute.

On what terms purchaser is evicted in Equity.

Where a purchaser for value is evicted in Equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements (r), (except improvements made after he has discovered the defect of title (s)); and will be debited with the rents which he has received: but, unless guilty of actual fraud or purchasing with notice of an infant's title (t), the account will not extend to such rents as, without his neglect or default, he might have received (u): nor will he be conclusively bound by his admissions in his answer as to receipts (x): nor, except in cases where the defendant fills a fiduciary character, will the account, as a general rule, be carried back beyond the filing of the bill (y): nor will annual rests be directed, unless a special case for that form of decree be

(r) See *Mill* v. *Hill*, 3 H. L. Ca. 828.

(s) See *Kenney* v. *Browne*, 3 Ridg. P. C. 518; *Clare Hall* v. *Harding*, 6 Ha. 273.

(t) *Blomfield* v. *Eyre*, 8 Beav. 250.

(u) *Howell* v. *Howell*, 2 Myl. & Cr. 478.

(x) *S. C.*

(y) *Thomas* v. *Thomas*, 2 K. & Jo. 79, 85; and see *Hicks* v. *Sallitt*, 3 De G. M. & G. 782, 813; *Nanney* v. *Williams*, 22 Beav. 470; *Hicks* v. *Hastings*, 3 K. & J. 701; and compare *Penny* v. *Allen*, 7 De G. M. & G. 409, 427; *Morgan* v. *Morgan*, L. R. 10 Eq. 99.

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made on the pleadings (z): and the decree should contain a direction for just allowances (a). In a modern case, where a man completed the purchase of, and paid for, an estate which his wife had contracted for before marriage, and then sold it without her concurrence, the purchasers, upon being evicted by the wife's heir after the husband's death, were allowed a lien on the estate for the purchase-money paid by the husband and for moneys expended in lasting improvements from the date of his purchase, with interest: but, accepting this relief, they were treated as mortgagees in possession; and were debited with rents received, or which might but for wilful default have been received, during the like period (b).

Whether he can claim for improvements or repairs.

A person claiming under a fraudulent deed, voidable at Law, cannot, however, claim for improvements or repairs (c); but the rule may be different when relief against the deed can be afforded only in Equity (d): and the deed, though invalid, is not actually fraudulent (e): and even at Law, in an action for mesne profits, an allowance may be made for ground-rent, rates, and taxes (f); and where there is a mere legal right to be determined at Law, it seems doubtful whether, according to present practice, a Court of Equity has any jurisdiction to make an allowance to the evicted party for money expended in repairs (g).

If estate belonged to infant.

Where the purchase is of the estate of an infant, the

(z) *Neesom* v. *Clarkson*, 4 Ha. 97; see *Donovan* v. *Fricker*, Jac. 165.

(a) *Howell* v. *Howell*, 2 Myl. & Cr. 478.

(b) See *Neesom* v. *Clarkson*, 2 Ha. 176; 4 Ha. 97; *quære* whether an allowance should not have been made for interest upon the difference between Clarkson's and Syke's purchase-money, the account of rents and profits being carried back to the date of Syke's purchase? And see and consider *Parkinson* v. *Hanbury*, L. R. 2 E. & Ir. Ap. 1, and Lord Westbury's comments on *Neesom* v. *Clarkson*; see too *Maddison* v. *Chapman*, 1 J. & H. 470.

(c) *Musadee* v. *Meerza*, 8 Moo. P.C. 90, 113.

(d) *Hamblyn* v. *Ley*, 3 Sw. 301; *Trevelyan* v. *White*, 1 Beav. 588; *Stepney* v. *Biddulph*, 13 W. R. 576.

(e) *Stepney* v. *Biddulph*, 13 W. R. 576.

(f) *Barber* v. *Brown*, 3 Jur. N. S. 18, 21; 1 C. B. N. S. 121; 26 L. J. C. P. 41.

(g) *Hooper* v. *Cooke*, 20 Beav. 639.

purchaser may, it seems, be treated as a bailiff, and be charged with interest on his balances, and with such rents as he might have received but for wilful default (*h*): and the account will not be limited to a period of six years next before the filing of the bill, but will be carried back to the commencement of the purchaser's possession (*i*). It has, however, been held that this extraordinary relief is to be confined to cases where the infant has been in possession by himself or his guardian; and does not extend to an ordinary case of adverse title (*k*), or of a purchaser buying from another an estate which really belongs to an infant.

Purchase by trustees.

As a general rule, where the defendant fills a fiduciary character the account is directed, either from the commencement of his occupancy, or from six years before the date of filing the bill, at the discretion of the Court (*l*).

Statute of Limitations begins to run on conveyance by trustees.

Where land vested in trustees upon an express trust is sold by them in breach of trust, the conveyance to the purchaser sets the Statute of Limitations running as against the *cestuis que trust* (*m*). But, as we have already seen (*n*), a much shorter time than the statutory limit will bar a *cestui que trust* who, without reasonable excuse, knowingly neglects to prosecute his claim to the property. In cases of concealed fraud the Statute does not begin to run until the fraud is or might be discovered (*o*).

Section 6.

(6.) *As to contribution to paramount charges.*

Contribution by purchasers to paramount charge.

Where an estate subject to a paramount charge becomes divided amongst several *bonâ fide* purchasers, it becomes a matter of some difficulty to determine the proportions in

(*h*) *Blomfield* v. *Eyre*, 8 Beav. 250; and see *Wyllie* v. *Ellice*, 6 Ha. 505.

(*i*) *Hicks* v. *Sallitt*, 3 De G. M. & G. 782; *Schroder* v. *Schroder*, Kay, 590; *Hicks* v. *Hastings*, 3 K. & Jo. 701; *Nanney* v. *Williams*, 22 Beav. 452.

(*k*) *Crowther* v. *Crowther*, 23 Beav. 305.

(*l*) *Thomas* v. *Thomas*, 2 K. & Jo. 85; and see *Penny* v. *Allen*, 7 De G. M. & G. 409; and see cases cited *suprà*, p. 911.

(*m*) 3 & 4 Will. IV. c. 27, s. 25.

(*n*) *Suprà*, p. 48.

(*o*) See sect. 26.

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which they are to bear it as between themselves. The authorities on the subject will be found stated in full in a learned note by the Editor of Mr. Jarman's work on Conveyancing (*p*), and seem to lead to the following conclusions, *viz*:—

If two estates, X. and Y., are subject to a common charge, and estate X. be sold to A., A. will, as against the vendor and his representatives, have a *primâ facie* equity, in the absence of express agreement, and whether or no he had notice of the charge, to throw it primarily on estate Y. in exoneration of estate X. (*q*).

If, then, estate Y. be subsequently sold to B. with notice of the charge and of the prior sale of X. to A., B. purchases with notice of A.'s equity, and the entire charge must rest primarily upon Y. (*r*).

If B., at the time of his purchase, have notice of the charge as affecting Y., but be not led to suppose that estate X. is also subject to it, or if he purchase without notice of the charge, and A. purchased with notice of the charge as affecting Y., in either of these cases, it is conceived, B.'s equity is inferior to A.'s, and the entire charge must rest primarily upon Y.

If B. purchase with notice of the charge as affecting Y., and with no notice of the sale to A., and be led to suppose that X. is subject to the charge, or if both purchase without notice of the charge, B.'s equity would appear in either case to be equal in degree to A.'s: so that, either party, by taking a transfer of the charge and the securities (supposing them to be such as to give the incumbrancer a claim at Law against the two estates), would, it is conceived, be able to

(*p*) Vol. IX. pp. 127, *et seq.*; and see *Aicken* v. *Macklin*, 1 Dru. & Wal. 629; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 444.

(*q*) The marginal note to *Barnes* v. *Racster*, 1 Y. & C. C. C. 401, is incorrect; the first mortgage in that case was of only *one* estate, see p. 403. *Tidd* v. *Lister*, 10 Ha. 157.

(*r*) See and consider *Hamilton* v. *Royse*, 2 Sch. & L. 315, 328.

throw the charge exclusively upon the other (s). So, the incumbrancer, himself, if able to proceed at Law against the estates, might proceed against the two in such proportions, or against such one only, as he saw fit: and the purchasers, if they had the legal estate (as might happen in the case of the incumbrance being a rent-charge), would have no remedy as between themselves (t): but if their estates were equitable, or if the incumbrancer were obliged to, or did in fact, resort to a Court of Equity for payment of his claim, then, the equities being equal, A.'s would prevail as being prior in date.

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In case of mortgages.

So, in the case of mortgages, if two estates, X. and Y., are subject to a common charge in favour of A., and afterwards X. alone is mortgaged to B., B. is entitled to have the securities marshalled, and to throw A.'s mortgage primarily on estate Y. in exoneration of estate X. (u). And where two separate estates, each of which was subject to a prior mortgage, were by the same deed mortgaged to A. for securing an entire sum, and the two prior mortgages were subsequently transferred to B., who had notice of A.'s charge, it was held, in a suit for foreclosure by B., that A. could not insist on redeeming one estate without the other (x). The right of tacking two or more securities from the same mortgagor exists equally in redemption and in foreclosure suits (y).

Purchaser subject to common charge supposed to be invalid.

If A. and B. simultaneously purchase estates X. and Y., with notice of a common charge, supposed to be invalid, but which eventually proves not to be so, and without making any provision for such a contingency, such charge, it is con-

(s) See *Titley* v. *Davies*, 2 Y. & C. C. C. 399; and see *Sober* v. *Kemp*, 6 Ha. 155.

(t) But the grantee of a rent-charge cannot *distrain* for part upon one, and for another part upon another tenant: *Owens* v. *Wynne*, 8 C. L. R., 766, Q. B.

(u) See *Gibson* v. *Seagrim*, 20 Beav. 614; and see, as to marshalling in such cases, *Re Professional Life Assurance Company*, L. R. 3 Eq. 668, 673, and cases there cited.

(x) *Vint* v. *Padgett*, 1 Giff. 446; 2 De G. & Jo. 611; *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Loveday* v. *Chapman* V.-C. Hall, — March, 1875.

(y) *Selby* v. *Pomfret*, 1 J. & H. 336, affd. 3 De G. F. & Jo. 598.

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ceived, would, as between the purchasers, be borne by the two estates, in shares proportioned to their respective values at the date of the purchase.

Right to redeem consolidated mortgages of several estates.

Where mortgages of different properties by the same mortgagor have been consolidated by one mortgagee, and the several equities of redemption have been conveyed to different purchasers, the right of redeeming all the mortgages, on foreclosure by the mortgagee, will be given to the purchasers successively, according to the dates of their respective conveyances (z). But where several persons, some prior to others as to the period of their enjoyment, claim the equity of redemption under the same instrument (as, *e.g.*, tenant for life and remainderman under a settlement), only a single common right of redemption is given (a); so also where a puisne mortgagee has submortgaged (b).

Land-tax.

The 38 Geo. 3, c. 60, contains provisions for the apportionment of land tax, where lands which have been rated together, are severed.

Fee-farm rents, &c.

We have already referred to the provisions usually made for the apportionment of a fee-farm rent or rent-charge, or of the rent and liabilities under a lease on the sale of freeholds or leaseholds in lots (c); and to the provisions of the Apportionment Acts (d).

Section 7.

As to the rights of third parties after conveyance in various cases.

(7.) *As to the rights of third parties after conveyance in various cases.*

Provision

The Lands Clauses Consolidation Act, 1845, contains provisions which enable the promoters of an undertaking, upon the discovery at any time of the existence of any

(z) *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Loveday* v. *Chapman*, *ubi suprà*; and see *Titley* v. *Davies*, 2 Y. & C. C. C. 399, n.; and compare *Edwards* v. *Martin*, 28 L. J. Ch. 49; *Bartlett* v. *Rees*, L. R. 12 Eq. 395, in which *Beevor* v. *Luck* does not seem to have been cited.

(a) *Beevor* v. *Luck*, *ubi suprà*.

(b) *Loveday* v. *Chapman*, *ubi suprà*.

(c) *Vide suprà*, pp. 130, 131.

(d) *Vide suprà*, p. 813.

outstanding estates or interests, to purchase the same compulsorily (*e*).

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in Lands Clauses Consolidation Act, 1845, for purchase of omitted interests.

In a modern case, where an estate was devised to A., subject to the payment of a legacy,—which was held to charge only the estate and not A. personally,—and A. sold the estate to B. with notice of the legacy, but without any reduction of purchase-money being made in respect thereof (the parties having determined that the charge was, upon technical grounds, inoperative), it was held that the legatee could not treat A. as a trustee in respect of so much of the purchase-money as would answer the legacy (*f*).

Estate sold subject to charge known, but treated as invalid, incumbrancer has no claim on vendor.

It has long been considered that where a mortgagee purchases and takes a conveyance to himself of the equity of redemption, he thereby lets in all intermediate incumbrances of which he had notice (*g*); unless the property is conveyed to a trustee, for the express purpose of keeping the charge alive (*h*). The general doctrine has been doubted by an eminent judge (*i*); and upon examining the registrar's book, it appears that the leading case on the subject is no authority whatever for the proposition in support of which it has been usually cited. The facts were these: the estate was mortgaged by Walker to Marsham; then two judgments were entered up against Walker; then Walker sold and conveyed the equity of redemption to Marsham: "before the deed of sale the defendant Marsham had notice thereof (*viz.*, the judgments), and therefore had the premises for 245*l.* less than

Conveyance of equity of redemption to mortgagee.

(*e*) See 8 Vict. c. 18, s. 124, *et seq.*; *Hyde* v. *Manchester Corp.*, 5 De G. & S. 249. As to the effect of a conveyance of copyholds according to a form prescribed in a private Act, see *Grand Junction Canal Company* v. *Dimes*, 15 Sim. 402.

(*f*) *Jillard* v. *Edgar*, 3 De G. & S. 502; and see *Newman* v. *Kent*, on appeal, *ibid.* 510; reported on hearing at the Rolls, 1 Mer. 241.

(*g*) *Greswold* v. *Marsham*, 2 Ch. Ca. 170; *Brown* v. *Stead*, 5 Sim. 535; and see *Toulmin* v. *Steere*, 3 Mer. 210; *Smith* v. *Phillips*, 1 Ke. 694; *Squire* v. *Ford*, 9 Ha. 60; *Tildesley* v. *Lodge*, 3 Sm. & G. 543; *Chesshyre* v. *Biss*, 2 Giff. 287; and see *Selby* v. *Pomfret* 1 J. & H. 336; 3 De G. F. & Jo. 595.

(*h*) *Bailey* v. *Richardson*, 9 Ha. 734; and see *Watts* v. *Symes*, 1 De G. M. & G. 240, 243; *Davis* v. *Barrett*, 14 Beav. 542; and also the third point decided in *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393.

(*i*) See 1 De G. & G. 244,

the premises were worth:" the amount struck off from the purchase-money being the estimated amount due on the judgments; and the amount actually paid by Marsham to Walker being 600*l.*: so that the case was clear for relief against Marsham, not *quâ* mortgagee, but *quâ* the purchaser of the equity of redemption (*j*). But, notwithstanding the doubt just referred to, it seems to be the established doctrine that a mortgagee taking a conveyance to himself of the equity of redemption, lets in all intermediate incumbrances of which he has notice (*k*).

In a late case, where A. and B., joint owners, mortgaged their estate to C. to secure a common debt, and B. then sold his share to A., leaving the purchase-money a charge upon the estate, and A. subsequently sold the equity of redemption to C., in consideration of being released from the original mortgage debt, for which the estate was an insufficient security, it was held that C.'s first mortgage was not extinguished as against B., so as to give B. priority over C. (*l*.) In this case, B., by the sale of the equity of redemption to C., was released from his liability under the first mortgage; and it was obviously inequitable that, while getting the benefit of the extinction of the first charge, he should at the same time claim, as against C., priority for his second mortgage. So, where a legal mortgagee of leaseholds, with the concurrence of the executor of the mortgagor, assigned the property to a new mortgagee, in consideration of the discharge of his debt and a further advance to the executor, and the deed contained no assignment of the mortgage debt, it was, nevertheless, held that the debt was not extinguished, so as to give priority to a *mesne* incumbrancer (*m*). The Court considered it clear that there was an intention to preserve the priority of the first charge; but the decision was mainly rested on the ground

(*j*) *Greswold* v. *Marsham*, Hil. T., 1 Jac. II., Reg. Lib. A. 1685, fo. 399.

(*k*) Where he has reason to suspect the existence of intervening charges, he should be careful to have his own mortgage, and any other prior incumbrances which he may pay off, kept on foot for his own protection.

(*l*) *Hayden* v. *Kirkpatrick*, 34 Beav. 645.

(*m*) *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531.

that the maintenance of the orignal debt, as a debt, was not essential to the continuance of the security.

Mortgagor buying from his first mortgagee cannot defeat mesne incumbrancers.

If a mortgagor purchase from his first mortgagee, selling under his power of sale, he takes the property subject to any subsequent incumbrances which he himself may have created (n).

Mortgagee selling after foreclosure.

If a mortgagee having no power of sale, foreclose, and then fairly sell the estate for less than the amount due to him, he cannot afterwards recover from the mortgagor, upon his collateral personal security, the amount remaining unsatisfied (o): but the principle of this decision—such principle, it is conceived, being that the action would open the foreclosure—would not apply to the case of a sale under the usual power or trust. And the mere attempt to sell will not, in Equity, disentitle the mortgagee to prove against the mortgagor's estate in an administration suit: but he will not be allowed the costs of the foreclosure (p); and, of course, not of the attempted sale.

Purchaser from mortgagee bound by his agreement with mortgagor.

A person who, having contracted with a mortgagee for the purchase of the property under his power of sale, entered into a subsequent agreement with the mortgagor to allow him to redeem, and then took a conveyance of the property, has been held bound by such agreement (q).

Judgment creditor purchasing part of the lands extended.

Where a judgment creditor having become tenant by elegit, buys part of the lands extended, this will discharge the residue of the lands, and satisfy the judgment (r). So, in the case of a rent-charge, the purchase of part of the land by the grantee discharges the residue: *sed aliter*, in the case of a rent-service (s).

(n) *Otter* v. *Lord Vaux*, 6 De G. M. & G. 638; affirming V.-C. W. 2 K. & Jo. 650.

(o) *Lockhart* v. *Hardy*, 9 Beav. 349.

(p) *Haynes* v. *Haynes*, 3 Jur. N. S. 504, V.-C. K.; Seton, 394.

(q) *Orme* v. *Wright*, 3 Jur. 10.

(r) *Ross* v. *Pope*, Plow. 72; Shep. Touch. 366; Bac. Ab. Execution, B. 7; *Handcock* v. *Handcock*, 1 Ir. Ch. R. 467; *Hele* v. *Lord Bexley*, 17 Beav. 14; 20 Beav. 127.

(s) Co. Litt. 147 b. 148 a.

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Purchase of copyholds by one of several lords of a manor.

In a modern case, where several persons were seised of a manor as tenants in common in fee, and one of them purchased copyholds of the manor, and was admitted thereto, with the concurrence of the other lords, it was held that his copyhold interest in the lands was, to the extent of his undivided interest in the manor, extinguished or merged in the freehold (*t*).

Conveyance determines parol licence.

The conveyance, we may remark, puts an end to a parol licence from the vendor to a stranger, to enjoy an easement over the estate; and if he afterwards enter on the land, his ignorance of the sale will be no defence to an action of trespass at the suit of the purchaser (*u*); and although the licensee may have incurred expense upon the faith of the licence, this does not destroy its revocable character (*x*).

Purchaser of part of rent-charge may distrain.

A rent-charge may be divided without the consent of the owner of the lands charged; and it would appear that, if conveyed to several purchasers, each may distrain upon the tenant before attornment (*y*); but if the rent-charge be severed there can be no distress for arrears (*z*).

Upon a question of boundaries between purchasers of adjoining lots who have obtained their conveyances, the advertisement of sale under which they bought may, under special circumstances, be received as evidence of reputation (*a*).

Purchaser, when liable for nuisance.

In *Rex* v. *Pedly* (*b*) it was laid down by Littledale, J., that if a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that he has no opportunity of removing the

(*t*) *Cattley* v. *Arnold*, 4 K. & Jo. 595; see judgment and cases cited.

(*u*) *Wallis* v. *Harrison*, 4 M. & W. 538; and see *Wood* v. *Leadbitter*, 13 M. & W. 838; *Coleman* v. *Foster*, 1 Hurl. & N. 37; and see *Frogley* v. *Lord Lovelace*, John. 339; *Taplin* v. *Florence*, 10 C. B. 744.

(*x*) *Adams* v. *Andrews*, 15 Q. B. 284; as to the licensee being entitled to reasonable notice of the revocation of the licence, see *Cornish* v. *Stubbs*, L. R. 5 C. P. 334; *Mellor* v. *Watkins*, L. R. 9 Q. B. [illegible]

(*y*) *Rivis* v. [illegible]son, 5 M. & W. 255; and see 4 Anne, c. 16, s. 9.

(*z*) *Stavely* v. *Alcock*, 16 Q. B. 636.

(*a*) *Murley* v. *M'Dermott*, 3 Nev. & P. 356, 360.

(*b*) 1 Ad. & E., sec. 827; and see *Rosewell* v. *Prior*, 2 Salk. 460.

nuisance, yet, by purchasing the reversion, he makes himself liable for the nuisance. But if, after the reversion is sold, the nuisance is erected by the occupier, the reversioner incurs no liability. If, however, there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with a nuisance upon it. But in one case (*c*) the Court of Common Pleas held that, although a man may be liable for demising premises when the nuisance exists, or for re-letting them after their user has created a nuisance, or for not doing that which he had undertaken to do, and which would have prevented the nuisance, yet he is not responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises; they being such as may or may not become a nuisance (*d*).

As to liability of leaseholder for rent and covenants after sale.

A lessee, although he may have sold and assigned away the term, continues liable for the performance of the covenants as well as for the payment of the rent, during the continuance of the term: but a person who claims merely as assignee, as there is no privity of contract between him and the reversioner, is liable only for such breaches of covenant and such rent as occur or accrue due during his individual ownership; and for these, he may be sued at Law even after having assigned over (*e*): but, of course, he remains liable under such covenants for indemnity, &c., as he may have entered into with the party from whom he himself purchased. It

(*c*) *Rich* v. *Basterfield*, 4 C. B. 783, 805.

(*d*) As to what is a nuisance, see *Walter* v. *Selfe*, 4 De G. & Sm. 322, and the definition there given: *Soltan* v. *De Held*, 2 Sim. N. S. 133; and see *St. Helen's Company* v. *Tipping*, 11 H. L. Ca. 642; *Crump* v. *Lambert*, L. R. 4 Eq. 409; and see and consider *Harrison* v. *Good*, L. R. 11 Eq. 338, where the establishment of a national school was held not to be a nuisance within the meaning of the ordinary restrictive covenant. Noise, noxious vapour, and smoke, though not injurious to health, have been held to be a nuisance to an adjoining owner; see *Inchbald* v. *Robinson*, L. R. 4 Ch. Ap. 388, and cases there cited; and see Kerr on Injunctions, 363, 364.

(*e*) See *Harley* v. *King*, 2 Cr. M. & R. 18; *Pitcher* v. *Tovey*, 1 Salk. 81; 2 Platt on Le. 417, 418; but see *Fagg* v. *Dobie*, 3 Y. & C., Exch. 103; *Moule* v. *Garrett*, L. R. 5 Exch. 132, and cases there cited.

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has been held, at Law, that each successive assignee of a lease is under an implied obligation to indemnify the original lessee against all breaches committed during the continuance of his own interest; and that this implied contract is not negatived by an express covenant to indemnify the immediate assignor (*f*).

(*f*) *Moule* v. *Garrett*, *ubi suprà*; Cleasby B. *dissentiente*.

CHAPTER XVI.

Chap. XVI.

AS TO THE RIGHTS, UNDER THE CONVEYANCE, OF JOINT PURCHASERS, AND PERSONS OTHER THAN THE NOMINAL PURCHASERS.

1. *As to joint purchasers.*
2. *As to purchases in name of nominal purchaser.*

Section 1.

Purchasers joint-tenants at Law, and when in Equity.

(1.) A CONVEYANCE of land to two or more persons without words indicating that they are to take as tenants in common, constitutes, at Law, a joint tenancy (*a*): and the rule is the same in Equity (*b*), if they advance the money in equal proportions (*c*), and do not purchase as partners, or for the purposes of trade or speculation.

Not if they contribute unequally to purchase-money;

If, however, two purchase, and one advance more of the purchase-money than the other, there will, in Equity, be no survivorship, although there are no words indicating a tenancy in common (*d*); but they will, in the absence of any stipulation to the contrary, be interested in proportion to their shares of the purchase-money. In *Lake* v. *Gibson* (*e*), the proposition is qualified by the expression, "if the proportions of the money are not equal, *and this appears on the deed itself*" (*f*), and the *dictum* is thus cited by Lord

(*a*) Co. Litt. 180, b; *Aveling* v. *Knipe*, 19 Ves. 441, 444.

(*b*) *Moyse* v. *Giles*, 2 Vern. 385; *Rea* v. *Williams*, Sug. 698, where the conveyance was taken in the name of the trustee; *Bone* v. *Pollard*, 24 Beav. 283.

(*c*) Sug. 697, 698; and see *Robinson* v. *Preston*, 4 K. & Jo. 505, and the cases there reviewed.

(*d*) *Rigden* v. *Vallier*, 2 Ves. S. 252, 258; *S.C.*, 3 Atk. 731, 735; but see *Harris* v. *Ferguson*, 16 Sm. 308; as to the soundness of the distinction between equal and unequal advances of the purchase-money, see reporter's note in *Jackson* v. *Jackson*, 9 Ves. 597; Sug. 698; Wh. & T. L. C. 4th edit., p. 185.

(*e*) 1 Eq. Ca. Abr. 291; 1 White and Tudor's Leading Cases, 4th edit., p. 177; and see cases cited in note.

(*f*) See, as to the words italicized, *Harrison* v. *Barton*, 1 J. & H. 287, and V.-C. Wood's comments, p. 293; and see Sug. 698, note.

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St. Leonards (*g*): but the rule is laid down by Lord Hardwicke without qualification (*h*). It is, however, conceived that the inequality in the sums advanced, must, to have this effect, be in accordance with the original or some subsequent express agreement between the parties; and not be the mere result of any temporary pecuniary arrangement at the time of the completion of the purchase (*i*).

although circumstances may raise a presumption of a tenancy in common,

And, although the purchase-money may have been contributed in equal proportions, an intention to hold in severalty may be presumed *aliunde*. Thus, where two sisters paid the rents of certain lands of which they were tenants in common to a joint account at their banker's, and sums of stock were from time to time purchased in their joint names out of the balance in the banker's hands, the Court, looking at the source whence the funds were derived, held that there was a tenancy in common in the stock (*k*). And, notwithstanding the Statute of Frauds, parol evidence of the cotemporaneous circumstances, and of the subsequent dealings with the property, is admissible to prove an intention to hold in severalty; but such evidence must be confined to facts, as distinguished from mere statements of intention (*l*). In one case, however, a declaration, by affidavit, of intention, made long after the date of the transaction, was admitted in evidence (*m*).

and parol evidence of *facts* is admissible for the purpose;

or being tenants in common of mortgage, buy equity of redemption,

So, it has been held that tenants in common of a mortgage, buying the equity of redemption, shall hold it also in common (*n*); so, where land is conveyed to partners as joint tenants for the purposes of trade, there is no survivorship in Equity (*o*); so, also, if it be conveyed to purchasers, not otherwise in partnership, as joint tenants, but for the purpose of a

or purchase for purpose of trade or speculation;

(*g*) Sug. 698.

(*h*) 2 Ves. S. 258; 3 Atk. 735; and see judgment in *Robinson* v. *Preston*, 4 K. & Jo. 505.

(*i*) See *Wood* v. *Birch*, Sug. 698, and *Aveling* v. *Knipe*, 19 Ves. 445.

(*k*) *Robinson* v. *Preston*, 4 K. & Jo. 505. See and consider this case.

(*l*) *Harrison* v. *Barton*, 1 J. & H. 287, where the purchase-money was contributed equally.

(*m*) *Devoy* v. *Devoy*, 3 Sm. & G. 403; and *quære*, *vide infrà*, p. 934.

(*n*) *Edwards* v. *Fashion*, Prec. Ch. 332; 19 Ves. 444.

(*o*) *Morris* v. *Barrett*, 3 Y. & J. 384; *Elliott* v. *Brown*, 3 Sw. 489; *Houghton* v. *Houghton*, 11 Sim. 491.

joint adventure or speculation (p); "the purchase of the land being made to the intent that they shall become partners in the improvement; it being only the substratum for an adventure in the profits of which it was intended they should be concerned" (q).

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So, if joint tenants subsequently contract to deal with the property as if in trade, or if other dealings rebut the presumption of joint tenancy (r), the Court will receive evidence of such contract or dealing; and will hold that there is no survivorship (s).

or, being joint-tenants, subsequently agree to hold property as if in trade.

And where partners purchased land out of partnership profits, and *let* it, but brought the profits into the partnership accounts, it was held that there was no survivorship; although the conveyance was to them as joint tenants (t). So, where two partners purchased real estate out of partnership moneys, and had it conveyed to them in separate moieties to uses in bar of dower, it was held that the entire estate was partnership property; notwithstanding that each partner had, at his own expense, built a private residence for himself upon a portion of the estate set apart for this purpose (u): the bulk of the estate appeared from the books of the partnership to have been treated as a joint speculation; and there was no sufficient evidence of any specific appropriation of the dwelling-houses as part of the separate estates of the partners.

And in the case of a joint purchase, if one joint tenant lay

Joint-tenant

(p) *Lake* v. *Cradock*, 3 P. Wms. 158; *Lyster* v. *Dolland*, 1 Ves. jun. 431; *Dale* v. *Hamilton*, 5 Ha. 369; 2 Ph. 266; *Clements* v. *Hall*, 2 De G. & Jo. 173; *Darby* v. *Darby*, 3 Drew. 495; 2 Jur. N. S. 271; and compare *Steward* v. *Blakeway*, L. R. 6 Eq. 479; affd. L. R. 4 Ch. Ap. 603.

(q) *Per* Lord Eldon, 9 Ves. 597.

(r) See *Harrison* v. *Barton*, and *Robinson* v. *Preston*, *ubi suprà*.

(s) *Jefferey's* v. *Small*, 1 Vern. 217; see 5 Ha. 384; and see also cases cited 1 Wh. and T. L. C., 4th edit., pp. 188, 189.

(t) *Morris* v. *Barrett*, 3 Y. & J. 334. The share of a deceased partner in the freehold or copyhold estates of the partnership is not liable to probate duty; *Custance* v. *Bradshaw*, 4 Ha. 315; see, too, *Fraser* v. *Kershaw*, 2 K. & J. 501; and *vide suprà*, p. 85.

(u) *Re Streatfield*, 7 Jur. N. S. 715; S. C. *sub nom. Bank of England case*, 3 De G. F. & Jo. 645.

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has a lien on estate for expenses of repairs, &c., and renewal fines.

out money in repairs or improvements (*x*),—which may be either necessary, or sanctioned by the other joint tenants,—or, in the case of renewable leaseholds, advance money for the expense of a renewal (*y*), he has a lien upon the estate for the amount: but not, it would seem, upon the share of the other joint owner, for moneys which he has advanced to him, and which, without any agreement, have been laid out in the repairs of the property (*z*): and if one purchaser advance more than his share of the purchase-money, he acquires no lien on the estate; nor, it would appear, has he any remedy except a suit for contribution (*a*).

Where, however, the property is acquired in joint tenancy, not by *purchase* but by *devise*, then, although it may be used for partnership purposes, a tenancy in common will not be inferred in Equity; unless by express agreement, or by the mode of dealing with the property for a long period, an intention to sever the joint tenancy must be presumed (*b*).

Tenant in common receiving entire profits.

If one tenant in common take the rents of the entirety, or of more than his own proportionate share, he is liable to an action of account at the suit of his co-tenant: but he is not liable to account for the crops or other profits (not pecuniary) of the land received by him during a sole occupancy (*c*). Where two persons were tenants in common of a mine, and owners in severalty of different portions of the surface, and their lessee of the mine sunk a shaft in the estate belonging to one for the purpose of raising the minerals, it was held that both were entitled to the benefit of it (*d*). A tenant in

(*x*) *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 291; White and Tudor's Leading Cases in Equity, vol. i., 4th edit., p. 177, and cases cited in note.

(*y*) See *Hamilton* v. *Denny*, 1 Ball & B. 199.

(*z*) *Kay* v. *Johnston*, 21 Beav. 536.

(*a*) See *Wood* v. *Birch*, Sug. 700.

(*b*) *Jackson* v. *Jackson*, 9 Ves. 591 overruling Sir Wm. Grant, M. R., 7 Ves. 535; *Brown* v. *Oakshot*, 24 Beav. 254; but see *Morris* v. *Barrett*, 3 Y. & J. 384; *Essex* v. *Essex*, 20 Beav. 442; *Waterer* v. *Waterer*, L. R. 15 Eq. 402; and *vide infrà*, p. 927.

(*c*) *Henderson* v. *Eason*, 17 Q. B. 701; 2 Ph. 308; and see *M'Mahon* v. *Burchell*, 2 Ph. 127; and *Bewley* v. *Hancock*, 6 De G. M. & G. 391.

(*d*) *Clegg* v. *Clegg*, 3 Jur. N. S. 92.

common who cannot prove the relative actual or minimum amount of his share, can recover nothing at Law (*e*), nor in Equity.

Any advantage secured by purchasing partner. enures to benefit of co-partners.

And, where purchasers stand in the relation of partners, any advantage secured by one,—*e. g.*, the renewal of a lease (*f*), or an abatement of incumbrances charged on the property (*g*), or a secret bonus from the vendor for effecting the sale (*h*),—enures to the benefit of the others.

On joint-purchase by way of speculation, partner must conform to agreement.

If the land is bought as a speculation,—*e.g.*, under an agreement between the partners that it shall be laid out, allotted, and sold for building purposes,—no partner can enforce a partition or sale in contravention of the terms of such agreement (*i*). If, however, the management of the concern be entrusted to certain partners, who refuse to execute the duty they have undertaken, the Court will, upon a suit being instituted by another partner, take on itself, so far as it can, to put him in the situation in which he would have been had the trusts been properly performed (*j*).

Land bought for partnership purposes, or by way of joint-speculation, is personal estate.

In the case of a partnership, where there is no special stipulation on the point, and the partners purchase freehold estates so as to make them partnership property, they are in Equity converted into personalty; not merely as between the purchasers *inter se*, but also as between the real and personal representatives of a deceased partner: and the rule prevails in the case of land bought as a joint speculation, for the purpose of selling it again in smaller parcels (*k*). Nor, as respects this doctrine of conversion, can any distinction, it is conceived, be drawn between cases where the land used

(*e*) *Doe* v. *King*, 6 Exch. 791.

(*f*) *Featherstonhaugh* v. *Fenwick*, 17 Ves. 298; *Clegg* v. *Fishwick*, 1 Mac. & G. 294.

(*g*) See *Carter* v. *Horne*, 1 Eq. Ca. Abr. 7, which according to the report was a mere case of a joint-purchase; and see 1 Mac. & G. 300.

(*h*) *Beck* v. *Kantorowicz*, 3 K. & Jo. 230.

(*i*) *Peck* v. *Cardwell*, 2 Beav. 137; and see *Dale* v. *Hamilton*, 2 Ph. 266.

(*j*) See 2 Ph. 276.

(*k*) *Darby* v. *Darby*, 3 Drew. 495; *Essex* v. *Essex*, 20 Beav. 450; *Forbes* v. *Steven*, L. R. 10 Eq. 178; *Waterer* v. *Waterer*, L. R., 15 Eq. 402; and see Lindley on Partnership, pp. 667 *et seq.*, and the cases there cited.

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for the purposes of the partnership has been purchased out of partnership moneys, and where it has been acquired in any other way; as by descent or devise (*l*).

Where the partnership trade is merely ancillary to the land.

In a late case, where land, with a quarry on it, was vested in co-owners, who worked the quarry and let the remainder of the land for agricultural purposes, and the yearly rents and profits, though generally divided amongst them, were occasionally invested in the purchase of other lands which were conveyed to the managing owner, and partly used in connection with the quarry, it was held that the share in the purchased lands of one of the co-owners who died intestate descended on his heir; although in the books of account the purchases were treated as if they had been purchases of stock in trade (*m*): but there had been a long course of dealing with the property as real estate; and the trade was regarded as merely ancillary to the beneficial enjoyment of the land.

Land of surviving partner—when reconverted into realty.

It is conceived that the land of a surviving partner will remain personal estate, as between his real and personal representatives, unless and until he indicates an intention that it shall be reconverted into realty. His mere winding up and discontinuing the business would probably be held to have that effect.

If conveyance be not taken in names of all the purchasers, trust may be proved by any subsequent writing

Where, upon an agreement for a joint-purchase, the conveyance is taken in the names of some, but not all, of the intended purchasers, the interests of the others may be established by any subsequent writing, signed by the fiduciary partners, and which acknowledges or proves the existence of the trust (*n*); and this, although the agreement

(*l*) See *Waterer* v. *Waterer*, *ubi suprà*, where the land used for the business of a nurseryman was acquired partly by devise, and partly by purchase; and *vide suprà* p. 927.

(*m*) *Steward* v. *Blakeway*, L. R. 6 Eq. 479; affirmed L. R. 4 Ch. Ap. 603; and see *Randall* v. *Randall*, 7 Sim. 271, 1 Wh. & T. L. C. 4th edit., p. 197.

(*n*) *Forster* v. *Hale*, 3 Ves. 696; *S. C.*, 5 Ves. 308; *Randall* v. *Morgan*, 12 Ves. 74; and compare *Barkworth* v. *Young*, 4 Drew. 1.

be that the one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land (*o*). Lord St. Leonards, however, considers it to be the better opinion (*p*), that the mere fact of one of two parties in treaty for an estate desisting therefrom under a parol agreement that the other shall complete for their joint benefit, is not such a part performance as takes the case out of the Statute of Frauds; and that, in the absence of any subsequent written admission of the trust, the aggrieved party, unless he can establish a resulting trust, by proof of his having paid or contributed to the purchase-money, has no remedy. Where there is an actual declaration of trust, of course it is not necessary that the party seeking to enforce it should himself have been a party to it (*q*). But if a nominal purchaser assume to act as sole owner, the other party must be prompt in coming to the Court (*r*).

signed by nominal purchasers.

Where land is held in trust, the declaration required by the Statute of Frauds must be signed "by the party who is *by law* enabled to declare such trust" (*s*); by which is meant the beneficial owner; not the trustee having the legal estate: and the declaration may be sufficient, though the trusts are not to take effect until after the settlor's death, and the declaration itself cannot operate as a testamentary instrument. In one case, Lord Cranworth is reported to have said that a mere declaration of trust in favour of a volunteer is inoperative (*t*); but, in a later case, his lordship repudiated this *dictum* as a general statement of the law (*u*).

Declaration of trust should be signed by *beneficial* owner.

(*o*) *Dale* v. *Hamilton*, 2 Ph. 266; but see and consider *Caddick* v. *Skidmore*, 2 De G. & Jo. 52; a case of alleged partnership in a mine: *Smith* v. *Matthews*, 3 De G. F. & Jo. 139, 151; and see Lindley, pp. 94 and 95.

(*p*) Sug. 700; *Atkyns* v. *Rowe*, Moo. 39; *Lamas* v. *Bayley*, 2 Vern. 627; see *Donahoe* v. *Conrahy*, 2 J. & L. 688, 695; *Caddick* v. *Skidmore*, *ubi suprà*. But may not such a case be treated as one merely of fraud on the part of an *agent*? *vide suprà*, p. 185; 2 H. & Tw. 230.

(*q*) 2 Ph. 275.

(*r*) See *Cowell* v. *Watts*, 2 H. & Tw. 224.

(*s*) See sect. 7.

(*t*) *Scales* v. *Maude*, 6 De G. M. & G. 43.

(*u*) *Jones* v. *Lock*, L. R. 1 Ch. Ap. 25.

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(2.) *As to purchases in the name of a nominal purchaser.*

So, if consideration has been paid by others than nominal purchasers, there will be a resulting trust without writing.

Where, upon a purchase, either by one or several, the conveyance is taken in the name of a stranger; or where, in the case of a joint-purchase, the conveyance is taken in the names of some, but not all, of the purchasers who pay for the estate (*x*), there will—subject to the exceptions subsequently noticed, and subject, of course, to any express stipulation (even by parol) on the point (*y*)—be a resulting trust in favour of the other parties who have paid, or helped to pay, the consideration-money: and this, whatever may be the tenure of the estate, or the mode in which the property is conveyed (*z*); unless the effect would be to break in upon the policy of an Act of Parliament (*a*): and no written declaration of trust is necessary; resulting trusts being expressly excluded from the operation of the Statute of Frauds (*b*). But, it is conceived, the mere fact of the money being so paid, not in pursuance of the original agreement, but either as a matter of necessity, or by virtue of a pecuniary arrangement between the parties at the time of completion, would not have this effect (*c*). If, for instance, A. and B. agree to purchase an estate, the money as between themselves to be advanced in certain specified proportions, and, at the time fixed for completion, A., either through B.'s temporary inability to pay, or merely for his convenience, advances the entire amount, this, it appears, will not give A. a claim to the whole estate (*d*).

Custom negativing doctrine of resulting trust, bad.

A manorial custom that a nominal purchaser of copyholds shall, notwithstanding the doctrine of resulting trusts, take

(*x*) *Wray* v. *Steele*, 2 Ves. & B. 388.

(*y*) See *Lady Bellasis* v. *Compton*, 2 Vern. 294; *Rider* v. *Kidder*, 10 Ves. 360.

(*z*) See *Dyer* v. *Dyer*, 2 Cox, 92, 93; 1 Wh. & T. L. C., 4th edit., p. 208, and cases cited in note.

(*a*) See *Ex parte Houghton*, 17 Ves. 251; *Ex parte Yallop*, 15 Ves. 68; cases under the Ship Registry Acts; and see the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) amended by 25 & 26 Vict. c. 63; and see and consider *Armstrong* v. *Armstrong*, 21 Beav. 71, 78; Sug. 701.

(*b*) 29 Car. II. c. 3, s. 8.

(*c*) See *Wood* v. *Birch*, Sug. 700.

(*d*) S. C.; and *Aveling* v. *Knipe*, 19 Ves. 445.

beneficially unless the trust is mentioned on the Rolls of the Manor, is bad (*e*).

Where an assurance is taken in the joint names of A. the purchaser, and B., and there is clear evidence of A.'s intention that B., if he survives, shall take beneficially, and not as a trustee for A.'s estate, B. surviving will be entitled, notwithstanding that the income has, with his concurrence, been enjoyed by A. alone during his life (*f*).

Payment of consideration may be proved by parol evidence.

For the purpose of raising a resulting trust, the mode in which the consideration has been paid may be proved by parol evidence (*g*), either during the life of the nominal purchaser, or, according to the weight of authority, after his decease (*h*); though, whether it can prevail against a direct denial in his answer seems to be doubtful (*i*); and it will, in any case, be received with great caution (*k*): nor can it be received to prove that a person who has paid for the estate with his own money, and taken a conveyance in his own name, was, in fact, the agent of another (*l*); nor to raise a resulting trust in favour of a vendor who has conveyed the estate without receiving the purchase-money; even although there be parol evidence to show that the transaction was really a conveyance in trust, and not a sale (*m*). But where such evidence is received it need not be confined to the direct

(*e*) See *Lewis* v. *Lane*, 2 Myl. & K. 449, overruling *Edwards* v. *Fidel*, 3 Madd. 237; see *Edwards* v. *Edwards*, 2 Y. & C. 123; and see *Jeans* v. *Cooke*, 24 Beav. 513.

(*f*) *Garrick* v. *Taylor*, 29 Beav. 79; affirmed 7 Jur. N. S. 1174; *dubitante* Knight Bruce, L.J.

(*g*) Although opposed to inconclusive written evidence; *Cripps* v. *Jee*, 4 Bro. C. C. 472; see *Leman* v. *Whitley*, 4 Russ. 423, 427.

(*h*) See *Sir John Peachy's case*, Sug. 702; *Lench* v. *Lench*, 10 Ves. 511, 517; 2 Madd. Ch. Pr. 141, 3rd edit.; Sug. V. & P. 11th edit., p. 910.

(*i*) *Newton* v. *Preston*, Prec. Ch. 103; see *Smith* v. *Wilkinson*, cited 3 Ves. 705; Sug. 701.

(*k*) *Gascoigne* v. *Thwing*, 1 Vern. 366; *Groves* v. *Groves*, 3 Y. & J. 163.

(*l*) *Bartlett* v. *Pickersgill*, 1 Cox, 15; and his conviction for perjury will not entitle the plaintiff to a decree; see *Rex* v. *Boston*, 4 East, 562; *Bartlett* v. *Pickersgill*, 4 East, 577, n.; see, however, *Fell* v. *Chamberlain*, 2 Dick. 484. But specific performance of a contract for purchase made by an agent, although appointed merely by parol, will be enforced, *Heard* v. *Pilley*, L. R. 4 Ch. Ap. 549; and see comments in the judgment on *Bartlett* v. *Pickersgill*.

(*m*) *Leman* v. *Whitley*, 4 Russ. 423;

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fact of payment: for instance, evidence of the poverty of the nominal purchaser has been received in proof of the impossibility of his having paid for the estate (n).

Conveyance may be shown to be mortgage.

And parol evidence is admissible to prove that what purports to be an absolute conveyance was, in fact, a mortgage (o).

But *primâ facie*, no trust results on purchase in name of wife or child.

As a general rule, no resulting trust arises when the conveyance is taken in the name of a child (p), grandchild (q), (if the father be dead) (r), or wife (s) of a sole (t) purchaser; or in the names of several children, either alone (u) or associated with the wife (x): and the rule seems to include the illegitimate children (if recognised as such) (y) of the purchaser (z): so, also, persons to whom the purchaser has placed himself in *loco parentis* (a); and adult (b) as well as infant,

Lord St. Leonards puts a query to the case, Sug. 702.

(n) *Ryal* v. *Ryal*, cited Amb. 413; *Willis* v. *Willis*, 2 Atk 71; and see *Lench* v. *Lench*, 10 Ves. 511, 519; *Heard* v. *Pilley*, L. R. 4 Ch. Ap 549, 552.

(o) *Cripps* v. *Jee*, 4 Bro. C. C. 472; *Muttyloll Seal* v. *Annundo Chunder Sandle*, 5 Moo. P. C. 72.

(p) *Mumma* v. *Mumma*, 2 Vern. 19; *Grey* v. *Grey*, 2 Sw. 594; *Redington* v. *Redington*, 3 Ridg P. C. 180; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Christy* v. *Courtenay*, 13 Beav. 96; *Lee* v. *Flood*, 17 Jur. 544; and see and compare *Stock* v. *McAvoy*, L. R. 15 Eq. 55, where there were acts of ownership by the father sufficient to rebut the presumption of advancement. The presumption arises in the case of personal as well as of real property; *Crabb* v. *Crabb*, 1 My. & K. 511; *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Hepworth* v. *Hepworth*, L. R. 11 Eq. 10. As to a father remaining liable for calls in a winding up, after a *bonâ fide* transfer into the name of his infant son, see *Reid's case*, 24 Beav. 318; and compare *Maxwell's case*, *ib.* 321.

(q) See *Kilpin* v. *Kilpin*, 1 Myl. & K. 520; *Loyd* v. *Read*, 1 P. Wms. 607.

(r) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.

(s) *Glaister* v. *Hewer*, 8 Ves. 199.

(t) See *Finch* v. *Finch*, 15 Ves. 51.

(u) *S. C.*, *ibid.*, 43; *Murless* v. *Franklin*, 1 Sw. 13.

(x) *Back* v. *Andrews*, 2 Vern. 120.

(y) See *Beckford* v. *Beckford*, Lofft, 490; and see 1 Myl. & K. 542.

(z) See *Tucker* v. *Barrow*, 2 H. & M. 515; where an illegitimate grandchild, though maintained by his grandfather, was thought not to be within the rule. *Sed quære.*

(a) See *Ebrand* v. *Dancer*, 2 Ch. Ca. 26; *Currant* v. *Jago*, 1 Col. 261; *Soar* v. *Foster*, 4 K. & Jo. 152, 157; *Tucker* v. *Barrow*, 2 H. & M. 515, see judgment; *Shephere* v. *Bradford*, L. R. 8 Eq. 134; case of nephew adopted as a son, and induced to sign the contract. A person may stand *in loco parentis* to a child living with and maintained by his father; *Powys* v. *Mansfield*, 3 Myl. & Cr. 359; *Pym* v. *Lockyer*, 5 Myl. & Cr. 29.

(b) *Grey* v. *Grey*, 2 Sw. 594; *Sidmouth* v. *Sidmouth*, 2 Beav. 456.

and female (c) as well as male children; and to extend to purchases by a female as well as by a male ancestor or *quasi* ancestor (d); but not to purchases in the name of a parent (e), brother (f), or other remoter relative; or of a woman with whom the settlor is living in concubinage (g), or—which in legal contemplation is the same thing—under the sanction of a marriage rendered void by the 5 & 6 Will. IV. c. 54 (h).

Although purchaser's name be also inserted; or nominees take successively.

And, although the point was otherwise decided by Lord Hardwicke (i), the same rule will, it is conceived, prevail, when, upon a purchase by a father, the conveyance is taken in the joint names of himself and his child (k). So, in the case of copyholds, the children take beneficially, although they are named to take in succession after the father (l); so, on a purchase by a husband in the joint names of himself and his wife, the latter surviving will take beneficially (m); so, if a stranger's name be also inserted, he will, it appears, take as a trustee for the children or wife (as the case may be) (n).

Presumption in favour of advancement may be rebutted by cotemporaneous acts or declarations;

But although, where property is purchased in the name of a wife or child, the purchase is, *primâ facie*, an advancement, still, the relation between the parties only raises a presumption of the intention of the purchaser to advance the nominee, which presumption may be rebutted by evidence

(c) See *Lady Gorge's case*, cited Cro. Car. 550; *Bone* v. *Pollard*, 24 Beav. 283.

(d) See *Loyd* v. *Read*, 1 P. Wms. 607; and see *Sayre* v. *Hughes*, L. R. 5 Eq. 376.

(e) See *Grey* v. *Grey*, 2 Sw. 598.

(f) *Maddison* v. *Andrew*, 1 Ves. 57, see p. 61; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9; *Robinson* v. *Preston*, 4 K. & Jo. 505.

(g) *Rider* v. *Kidder*, 10 Ves. 360.

(h) *Soar* v. *Foster*, 4 K. & Jo. 152.

(i) *Stileman* v. *Ashdown*, 2 Atk. 477, see p. 480.

(k) *Scroope* v. *Scroope*, 1 Ch. Ca. 27; *Back* v. *Andrew*, 2 Vern. 120.

(l) *Dyer* v. *Dyer*, 2 Cox, 92; *Swift* v. *Davis*, 8 East, 354, n.; *Murless* v. *Franklin*, 1 Swanst. 13; *Skeats* v. *Skeats*, 2 Y. & C. C. C. 9, overruling *Dickenson* v. *Shaw*, 1 Wat. Cop. 222; and see *Jeans* v. *Cooke*, 24 Beav. 513.

(m) See *Dummer* v. *Pitcher*, 2 Myl. & K. 262; and 2 Vern. 120, 683.

(n) *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; *Crabb* v. *Crabb*, 1 Myl. & K. 511; and see 1 Myl. & K. 542; see, however, *Skeats* v. *Skeats*, *ubi suprà*; and *Kingdome* v. *Bridges*, 2 Vern. 67.

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but not by subsequent acts or declarations of purchaser; *aliter* of nominee.

manifesting a contrary intention. That cotemporaneous acts (*o*) and even cotemporaneous (*p*) declarations of the purchaser, may amount to such evidence, has been often decided (*q*); but subsequent acts (*r*) and declarations (*s*) of the purchaser are not evidence to support the trust: although subsequent acts and declarations of the nominee may be so: but, generally speaking, we are to look at what was said and done at the time (*t*). In one case, which seems scarcely consistent with the authorities, where a father had transferred stock into the joint names of himself, his wife, and child, an affidavit by the transferor nine years afterwards that no trust was intended, and that the transfer was made under a misapprehension as to its legal effect, was admitted to rebut the presumption of advancement (*u*).

By what cotemporaneous acts or circumstances.

Where a copyholder, upon taking a purchase in his son's name, at the same Court surrendered it to the use of his own will (*x*); or, taking a purchase in the joint names of himself and two sons, at the same Court took a licence to lease for seventy years (*y*), it was held to be no advancement. So, where by the custom of a manor, copyholds were held for lives *successivè*, the legal estate being in the *cestui que vie*, and it appeared that on previous renewals the beneficial owner had selected other nominees, it was held that the insertion of the name of an illegitimate grandchild, who

(*o*) See *Prankerd* v. *Prankerd*, 1 Sim. & St. 1.

(*p*) *Williams* v. *Williams*, 32 Beav. 370; or *previous*; see 1 Myl. & K. 539.

(*q*) 2 Beav. 455; *Collinson* v. *Collinson*, 3 De G. M. & G. 409; and see *Kilpin* v. *Kilpin*, 1 Myl. & K. 520, where the declarations were made verbally to the purchaser's solicitor.

(*r*) *Mumma* v. *Mumma*, 2 Vern. 19; *Crabb* v. *Crabb*, 1 Myl. & K. 511, 518.

(*s*) See *Elliott* v. *Elliott*, 2 Ch. Ca. p. 231; *Redington* v. *Redington*, 3 Ridg. P. C. p. 200; *Woodman* v. *Morrel*, Freem. C. C. 32; but see *Robinson* v. *Preston*, 4 K. & Jo. 505; *Devoy* v. *Devoy*, 3 Sm. & G. 403; *Stone* v. *Stone*, 3 Jur. N. S. 708.

(*t*) *Sidmouth* v. *Sidmouth*, 2 Beav. 447; see p. 455; and see 1 Myl. & K. 532; 1 Coll. 267; and *Christy* v *Courtenay*, 13 Beav. 96; *Jeans* v. *Cooke*, 24 Beav. 513; *Ford* v. *Tynte*, 2 H. & M. 324; *Williams* v. *Williams*, 32 Beav. 370.

(*u*) *Devoy* v. *Devoy*, 3 Sm. & G. 403, *et quære*.

(*x*) *Prankerd* v. *Prankerd*, 1 Sm. & St. 1.

(*y*) *Swift* v. *Davis*, 8 East, 354, n.

lived with and was maintained by him, was insufficient to raise a presumption of advancement (z): but where a father purchased copyholds, paid the fine, and was admitted to hold to himself without words of limitation during the lives of his three sons and the life of the longest liver—the custom of the manor being to hold for lives *successivè*, and to require the first *cestui que vie* on the rolls to be admitted—this was held, after the father's death, to be an advancement (a).

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Where a father took a mortgage in his son's name, the presumption of advancement was rebutted by the evidence of the solicitor who prepared the deed, and who explained the circumstances under which the son's name was used; although there was evidence of a subsequent declaration by the father that the mortgage was taken in the son's name for the purpose of advancement and of escaping the payment of duty (b). So, where a father has purchased in his son's name, the fact of his having from the first treated him as a mere trustee, rebuts the presumption of advancement (c); so where the purchase is made with some particular object, as to sever a joint-tenancy (d). But the general presumption in favour of advancement cannot be negatived or qualified by transactions relating merely to other estates (e).

Prior advancement of child, whether material.

In the case of a child, it is a material circumstance that a provision has been previously made for him; but this is far from being decisive (f). In the older cases (g) it was held that the child, if already fully advanced, could not take;

(z) *Tucker* v. *Barrow*, 2 H. & M. 515.

(a) *Jeans* v. *Cooke*, 24 Beav. 513.

(b) *Dumper* v. *Dumper*, 3 Jur. N. S. 503; 3 Giff. 583.

(c) *Collinson* v. *Collinson*, 3 De G. M. & G. 409.

(d) Sug. 705, citing *Baylis* v. *Newton*, 2 Vern. 28; and *Birch* v. *Blagrave*, Amb. 264, where the object was to avoid serving as sheriff; and *Sir W. Raleigh's case*, cited Hard. 497, where the object was to avoid a merger.

(e) *Murless* v. *Franklin*, 1 Sw., see p. 19.

(f) *Per* Lord Brougham, 1 Myl. & K. 542.

(g) See *Elliot* v. *Elliot*, 2 Ch. Ca. 231, A. D. 1677; *Grey* v. *Grey*, 2 Sw. 600, decided A. D. 1667; and see Sug. 704.

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but, as observed by Eyre, L. C. B. (h), "the father is the only judge as to the question of a son's provision; the distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to:" and it has been observed by Lord Eldon that "the presumption of advancement in favour of a child is not to be frittered away by nice refinement" (i). At any rate, it appears that an advancement which is (k), or which the parent considers to be (l) only in part, will not rebut the presumption of advancement. A reversion expectant on a life estate, is *primâ facie* only a part advancement (m).

By what subsequent acts or circumstances.

A subsequent parol admission by a child that he holds only as trustee, may rebut the presumption in favour of advancement (n); but the fact that the child, even although adult, allows the parent to take and keep possession (o), is insufficient: nor is the result altered by the child actively assisting the parent in taking the profits; as, in the case of a purchase of stock in the child's name, by his executing a power of attorney for the father to receive the dividends (p): or by money being subsequently laid out on the property by the parent (q).

If, on the death of the purchaser, any part of the purchase-money remains due, it must, it seems, be paid out of his estate (r).

Election.

But although, as already noticed, no subsequent act on the

(h) See *Dyer* v *Dyer*, 2 Cox, 94; 1 White & Tudor's L. C. 4th ed 203.

(i) See 15 Ves 50.

(k) *Grey* v. *Grey*, 2 Sw. 600.

(l) *Redington* v. *Redington*, 3 Ridg. P. C. 106, see p. 191.

(m) *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111.

(n) See 2 Beav. 456; *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

(o) See *Elliot* v. *Elliot*, 2 Ch. Ca. 231; *Taylor* v. *Taylor*, 1 Atk. 386; *Grey* v. *Grey*, 2 Sw. 600; and see 2 Beav. 456; *Alleyne* v. *Alleyne*, 2 J. & L. 544, 555; *Christy* v. *Courtenay*, 13 Beav. 96.

(p) *Sidmouth* v. *Sidmouth*, 2 Beav. see p. 456.

(q) *Mumma* v. *Mumma*, 2 Vern. 19; *Shales* v. *Shales*, Freem. C. C. 252.

(r) *Redington* v. *Redington*, 5 Ridg. P. C., see 201; and see *Skidmore* v. *Bradford*, L. R. 8 Eq. 134.

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part of the purchaser can affect the rights of the nominee, if the presumption in favour of advancement has once arisen, yet a clear devise to another of the estate will raise a case of election against the nominee (s).

Presumption of advancement where a father settles his own along with trust moneys.

And where the father of a family has allowed money of his own to be invested in the purchase of an estate, along with other moneys subject to the trusts of his marriage settlement, it will require very strong evidence of intention to show that he did not intend it as an advancement (t): and where a father conveys land to his son, as a qualification for an office, or franchise, which requires in the holder a *bonâ fide* beneficial ownership, he cannot maintain that the transaction was intended to be in fraud of the law, so as to throw on the child a resulting trust (u). But a conveyance by a father to his son as a qualification for the parliamentary franchise is not in itself illegal (x). So, where A., under a groundless fear of being indicted for bigamy, conveyed his real estate to B., on a secret understanding that B. was to hold it merely as a trustee, and no consideration was paid, Lord Romilly, M. R., held that the transaction was free from any taint of illegality; and compelled B., who denied the trust and claimed the benefit of the Statute of Frauds, to execute a reconveyance (y).

Purchases in name of child or wife not within 27th or 13th Eliz.; *semble.*

A purchase in the name of a child (z), or, it is conceived, a wife, whether solely or jointly with the purchaser, is not within the 27 Eliz.: nor, it would seem (except in cases of actual fraud) within the 13 Eliz. (a); inasmuch as the settlor

(s) *Dummer* v. *Pitcher*, 5 Sim. 35; 2 Myl. & K. 262.

(t) *Ouseley* v. *Anstruther*, 10 Beav. 462; see *Gray* v. *Gray*, 2 Sim. N. R. 273.

(u) *Childers* v. *Childers*, 3 K. & Jo. 310; reversed on appeal, other facts being adduced, 1 De G. & Jo. 482.

(x) *May* v. *May*, 33 Beav. 81.

(y) *Davies* v. *Otty*, 35 Beav. 208; and see *Manning* v. *Gill*, L. R. 13 Eq. 485.

(z) See *Lady Gorge's case*, cited Cro. Car. 550; Sug. 916, 917; *Bone* v. *Pollard*, 24 Beav. 283; Sug. 703, 704.

(a) See *Fletcher* v. *Sidley*, 2 Vern. 490; *Proctor* v. *Warren*, Sel Ch. Ca. 78; Sug. 917; but see the *dictum* in *Christ's Hospital* v. *Budgin*, 2 Vern. 684; *et vide suprà*, p. 905; and see *Drew* v. *Martin*, 2 H. & M. 130, 133.

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might have handed the money to his child and the child might have made the purchase: and as the money could not formerly have been taken under an execution, there was no fraudulent alienation against creditors within the scope of the Statute. But the 1 & 2 Vict. c. 110, by making money, bank-notes, and securities seizable under a writ of *fieri facias*, has considerably enlarged the operation of the 13 Eliz. Thus, where a settlor, largely indebted at the time, purchased stock in the names of trustees, upon trust for his children, the settlement was declared fraudulent and void as against his creditors (*b*). The principle of this decision seems applicable to every case, whatever may be the subject of the purchase: and it may now, it is conceived, be laid down, as a general rule, that where the necessary or probable effect of the advancement, even without actual fraud, is to defeat or delay the settlor's creditors, it may be declared fraudulent and void within the 13 Eliz.

Purchase by trader in name of child or wife, whether voidable in case of bankruptcy.

The benefit of a purchase by a trader in the name of his child, or wife (*c*), was by the 1 Jac. I. c. 15, s. 5, transferred to his asignees in a subsequent bankruptcy. A conveyance by himself, *if at the time insolvent*, to his child or wife was avoided as against such assignees by the 6 Geo. IV. c. 16, s. 73 (*d*), which has been also considered to extend to purchases (*e*); whether correctly or not, may be doubted, as the Statute of James in terms included not only estates which the trader "conveyed," but those which he "caused or procured to be conveyed," which words are omitted in the 73rd section of 6 Geo. IV., and in the corresponding provision of the 12 & 13 Vict. c. 106 (*f*). Mere voluntary expenditure upon property already belonging to the wife or child, *e. g.*, the redemption and merger (*g*) of the land tax (*h*), or the

(*b*) *Barrack* v. *M'Culloch*, 3 K. & Jo. 110; and see as to a settlement of life policies being within the 13 Eliz., *Stokoe* v. *Cowan*, 29 Beav. 637; 7 Jur. N. S. 901.

(*c*) *Glaister* v. *Hewer*, 8 Ves. 195; 9 Ves. 12; 11 Ves. 377.

(*d*) Which has no retrospective operation; see *Wombwell* v. *Laver*, 2 Sim. 360.

(*e*) See Sug. 917.

(*f*) See sect. 126.

(*g*) *Aliter* if there were no merger; see *Emly* v. *Guy*, 3 Mer. 702; see now 16 & 17 Vict. c. 117, s. 2.

(*h*) *Borough* v. *Anon.*, cited 17 Ves. 205.

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erection of buildings, or even the enfranchisement of the property, if copyhold (*i*), was held not to be a purchase within the above rule. And now as we have seen (*k*) by the Bankruptcy Act of 1869 (*l*) any conveyance or transfer of property made by a trader, not falling within certain specified exceptions, may be rendered void by subsequent bankruptcy within a limited period.

On purchase in name of stranger, resulting trust may be rebutted by parol evidence.

And even upon a purchase in the name of a stranger, clear parol or other evidence is admissible to rebut the presumption in favour of a resulting trust; and to show that, as respects either the whole or part of the land, or the interest therein, the purchaser intended the nominee to take beneficially (*m*): but the onus of proof lies on the nominee (*n*).

Land purchased with trust-money becomes impressed with trust.

As to proof of application of money.

Where trustees (*o*) for the purchase of land, lay out the trust moneys and take the conveyance in their own names, the *cestuis que trust*, in order specifically to claim the lands, or to establish a lien upon them, must, of course, prove that they were purchased with the trust moneys. This may be proved either by direct evidence,—as where trust money was paid to a trustee by a cheque, which was next day paid over by him in part payment for the estate (*p*),—or by mere parol evidence of declarations by the trustees: but these, in the absence of corroborating circumstances, will be received with great caution (*q*). The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust money, has been made in execution of the trust (*r*).

(*i*) *Campion* v. *Cotton*, 17 Ves. 263, 273; and compare *Frazer* v. *Thompson*, 4 De G. & Jo. 659 reversing V.-C. S. 1 Giff. 49; 5 Jur. N. S. 669.

(*k*) *Suprà*, p. 910.

(*l*) 32 & 33 Vict. c. 71, sect. 91.

(*m*) See *Maddison* v. *Andrew*, 1 Ves. S. 57, 61; *Lloyd* v. *Spillett*, 2 Atk. 148; *Lane* v. *Dighton*, Amb. 409; *Rider* v. *Kidder*, 10 Ves. 360, 367; *Benbow* v. *Townsend*, 1 Myl. & K. 506, 510; *Deacon* v. *Colquhoun*, 2 Dre. 21; *Fowkes* v. *Pascoe*, L. R. 10 Ch. Ap. 343.

(*n*) *Redington* v. *Redington*, 3 Ridg. P. C. 178.

(*o*) Including in the term, agents. So, where a solicitor fraudulently purchased an estate in his own name out of his client's moneys, the client was held to have a lien on the estate; *Hopper* v. *Conyers*, L. R. 2 Eq. 549.

(*p*) *Price* v. *Blackmore*, 6 Beav. 507; and see *Ex parte Chadwick*, 15 Jur. 597, V.-C. K. B.

(*q*) Sug. 919; see *Lench* v. *Lench*, 10 Ves. 519.

(*r*) *Trench* v. *Harrison*, 17 Sm. 111;

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And where a trustee paid in trust moneys, (applicable to be invested in the purchase of real estate,) and moneys of his own, to his general account at his bankers', and then bought real estate, and paid for it by a cheque on his bankers, the Court—the purchase having proved a beneficial one—decided that the *cestuis que trust* were entitled to hold that such payment was made out of that part of the moneys standing to the general account which it was proper so to employ: *i.e.*, the trust moneys (*s*).

Purchase with wife's separate estate.

So, where land is purchased with the savings of a married woman's separate estate, and is conveyed to the husband, the wife's right will be established in Equity, on its being shown that the land was intended to be her separate property (*t*): so, where the wife's separate estate was invested in bank shares in the joint names of her husband and herself, and the husband procured them to be sold, and, unknown to his wife, invested the produce in part-payment of the purchase-money of an estate which was conveyed to himself, the wife was held to have a lien upon the estate for the amount of the moneys so invested (*u*): so, where a *feme sole* contracted to purchase, but the conveyance was, after her marriage, taken in her husband's name, it was held that the estate belonged to the wife, subject to a charge in the husband's favour for the portion of the purchase-money which he had contributed (*x*).

If purchase in breach of trust *cestuis que trust* can claim money or land.

And where trust moneys are, in breach of trust, invested in the purchase of real estate, the *cestuis que trust* have the option of proceeding either for the money or the estate; or for a proportionate part of the estate, if the trust fund formed

see, as to evidence of a contrary intention, *Perry* v. *Phelips*, 4 Ves. 108, 116; 17 Ves. 173; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; *Denton* v. *Davies*, 18 Ves. 499, 502; *Bennet* v. *Mayhew*, 1 Bro. C. C. 232; *Mathias* v. *Mathias*, 3 Sm. & Giff. 552, and cases there cited; 3 Jur. N. S. 429; *Wadham* v. *Rigg*, 10 W. R. 365; *Williams* v. *Thomas*, 8 Jur. N. S. 250.

(*s*) *Manningford* v. *Toleman*, 1 Coll. 670; see p. 674.

(*t*) *Darkin* v. *Darkin*, 17 Beav. 578.

(*u*) *Scales* v. *Baker*, 28 Beav. 91.

(*x*) *Maddison* v. *Chapman*, 1 J. & H. 470.

only a part of the consideration money (*y*): and a purchase of the fee simple by the executor of a mortgagee for a term of years, has been considered to fall within the rule (*z*): so, where a trustee improperly advanced the trust funds to enable one of the *cestuis que trust* to purchase an estate, the other *cestuis que trust* were held entitled to a lien upon the estate for the moneys so advanced (*a*). The claim of the *cestuis que trust* will prevail against that of the lord of the fee claiming by escheat (*b*).

Purchase, when to be considered in performance of covenant to settle land.

Where a man, having expressly agreed (*c*), or being under a statutory (*d*) or equitable (*e*) liability, to purchase and settle, or to find the money for purchasing and settling (*f*), lands, buys, but neglects to make a settlement, the purchased lands, or an adequate part thereof, will (if of a suitable nature and tenure) (*g*) be taken, in Equity, to have been bought in performance, or, if their entire value be inadequate, in part performance (*h*), of his agreement or liability (*i*).

How far form of

Nor will the result be altered by any peculiar terms in

(*y*) See *Att.-Gen.* v. *Corp. of Newcastle*, 5 Beav. 607; 12 Cl. & F. 402; *Wiles* v. *Gresham*, 2 Dre. 258; *Garner* v. *Moore*, 3 Dre. 277; *vide suprà*, p. 561. As to merger of charges, as between the real and personal representatives of the incumbrancer, on his purchasing the estates, see *Lord Selsey* v. *Lake*, 1 Beav. 146; *Hood* v. *Phillips*, 3 Beav. 513; in case of owner paying off incumbrances, *Pitt* v. *Pitt*, 2 Jur. N. S. 1010; buying up a lease, *Gunter* v. *Gunter*, 23 Beav. 571; in case of tenant in tail paying off a mortgage, *Horton* v. *Smith*, 4 K. & Jo. 624; or tenant for life, *Jameson* v. *Stein*, 21 Beav. 5; *Morley* v. *Morley*, 5 De G. M. & G. 618; *Lord Kensington* v. *Bouverie*, 7 De G. M. & G. 134. As to merger by way of reduction into possession, see *Allday* v. *Fletcher*, 1 De G. & Jo. 82.

(*z*) *Fosbrooke* v. *Balguy*, 1 Myl. & K. 226.

(*a*) *Birds* v. *Askey*, 24 Beav. 618.

(*b*) *Hughes* v. *Wells*, 9 Ha. 749.

(*c*) See *Deacon* v. *Smith*, 3 Atk. 323; *Att.-Gen.* v. *Whorwood*, 1 Ves. 534, 540.

(*d*) *Tubbs* v. *Broadwood*, 2 Russ. & Myl. 487.

(*e*) *Wilson* v. *Foreman*, cited 10 Ves. 519; *Manningford* v. *Toleman*, 1 Coll. 670.

(*f*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582; *Ex parte Poole*, 11 Jur. 1005; 1 De G. 581.

(*g*) See *Deacon* v. *Smith*, 3 Atk. 323; *Att.-Gen.* v. *Whorwood*, 1 Ves. 534, 541; *Pinnell* v. *Hallett*, Amb. 106; *et vide infrà*, p. 942.

(*h*) *Garthshore* v. *Chalie*, 10 Ves. 9; *Ex parte Poole*, 11 Jur. 1005; *Lechmere* v. *Earl of Carlisle*, 3. P. Wms. 228.

(*i*) *Wilcocks* v. *Wilcocks*, 2 Vern. 558; 2 Wh. & Tud. L. C., 4th edit., p. 415, and see cases cited in note.

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covenant is material.

the original agreement which do not, in the events which have occurred, go to discharge his general liability; *e.g.*, a stipulation that the purchase shall be made with the approbation of trustees, whose consent he has not applied for (*k*); or within a limited time, which has expired (*l*); or an option reserved to him of making a substitutional arrangement, if he have not made his election (*m*).

After-acquired land may be liable to satisfy the covenant.

So, where the agreement was to convey and settle lands, and the covenantor had either no land, or insufficient suitable land to perform the agreement, it has been held that after-purchased land was liable to supply either the entire want or partial deficiency (*n*); but, as a general rule, a covenant to convey and settle lands, which are not expressly defined by the covenant, will not create a specific lien on the lands of the covenantor, except in cases where the lands have been acquired with the intention of satisfying the covenant (*o*).

Who are bound by the equity.

The right of the parties interested under the proposed settlement seems clear as against the legal representatives of the purchaser. It was held by Lord Hardwicke (*p*) that such right would not prevail as against a sub-purchaser or mortgagee; as the subsale or mortgage "would have taken off all evidence of intention to bind" the land by the previous agreement; and a beneficial devise of the land would apparently come within the same reasoning. However, in a case in Bankruptcy, it was held by V.-C. Knight Bruce, that a subsequent mortgage, although conferring a good title on the mortgagee (who took his security without notice), left the equity of redemption impressed with the trusts of the settlement (*q*): and it appears from the judgment that even the mortgagee's title was considered to depend upon his want of notice.

(*k*) *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 218.

(*l*) *Ex parte Poole*, 11 Jur. 1005; 1 De G. 581.

(*m*) *Deacon* v. *Smith*, 3 Atk. 328.

(*n*) See *Deacon* v. *Smith*, 3 Atk. 328; *Wellesley* v. *Wellesley*, 4 Myl. & C. 561, and cases cited, 580.

(*o*) *Mornington* v. *Keane*, 2 De G. & Jo. 292; and see comments on *Wellesley* v. *Wellesley*, *ubi suprà*.

(*p*) *Deacon* v. *Smith*, 3 Atk. 327.

(*q*) *Ex parte Poole*, 11 Jur. 1005; 1 De G. 581.

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Remarks on Lord Hardwicke's *dictum* as to purchasers and mortgagees.

Lord Hardwicke's *dictum*, although cited as law by Lord St. Leonards, is, it is very deferentially submitted, open to this criticism, *viz.*, that it does not distinguish between intention, as existing at the date of the purchase, and intention, as existing at the date of the subsequent sale or mortgage. If the original purchase be unaccompanied by evidence of a cotemporaneous contrary intention, Equity, it may be contended, will assume that the purchaser intended then to do that which it was his duty to do, and will not recognize any subsequent alteration of purpose.

So, where the land comes within the terms of the agreement, its alleged unsuitability to answer the purposes of the settlement, should perhaps be hardly relied on by parties claiming against the settlement. Where, however, the land is of a different nature or tenure from that covenanted to be purchased, no presumption of an intention to perform the covenant can arise (*r*).

Expenditure on settled land, not a satisfaction of covenant to settle money.

It has been held that expenditure by the covenantor in erecting buildings, &c., upon land already in the stipulated course of settlement, is not a fulfilment in Equity of his engagement to pay money to the trustees for the purpose of being invested and settled upon trusts corresponding with the uses of the land (*s*).

Who may enforce covenant to settle.

An agreement to purchase and settle, where the ultimate limitation in the settlement is to be to the use of the settlor himself in fee, may be enforced not only by his wife and children, but even by his own heir as against his personal representatives, in cases where any of the intermediate uses of the settlement subsist at the death of the settlor (*t*).

(*r*) *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 227; *Deacon* v. *Smith*, 3 Atk. 323; *Lewis* v. *Hill*, 1 Ves. 274; *Whorwood* v. *Whorwood*, *ib.* 540.

(*s*) *Horlock* v. *Smith*, 17 Beav. 572; and see *Wiles* v. *Gresham*, 2 Dre. 258, 271; affirmed 3 Eq. R. 116; and see *Robinson* v. *Sykes*, 2 Jur. N. S. 895; *Mathias* v. *Mathias*, 3 Sm. & Gif. 552; 3 Jur. N. S. 429.

(*t*) *Barham* v. *Lord Clarendon*, 10 Ha. 126.

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CHAPTER XVII.

REMEDIES AT LAW FOR BREACH OF CONTRACT.

1. *Purchaser's remedies against vendor.*
2. *Vendor's remedies against purchaser.*
3. *Plaintiff how far bound to perform his part of agreement before action.*
4. *As to the agreement — how far affected by parol evidence.*
5. *Production of, when compelled.*
6. *Grounds of defence—the agreement being admitted.*
7. *Action, when it has been restrained in Equity.*
8. *General matters relating to the action.*
9. *Remedy by Mandamus against Railway Companies, &c.*

Section 1.

Purchaser's remedies against vendor.

(1.) WE have, in the preceding pages, discussed those matters which have appeared most naturally to present themselves for consideration, in cases where an ordinary contract between vendor and purchaser is perfected in the usual way by conveyance of the estate and payment of the purchase-money; without the course of events being disturbed by litigation, either actual or threatened, between the parties. It remains to consider the respective rights and liabilities of the parties, and their representatives, in cases where either party disputes the validity of the contract; or, on other grounds, refuses, neglects, or is unable to perform it.

When the Judicature Act, 1873, comes into operation, Courts of Law and Equity will, at any rate in theory, cease to be separate tribunals; but the Statute, whilst it aims at

removing all antagonism between the two systems, and establishes an uniform mode of procedure, does not deprive suitors of any of their existing rights or remedies. The nature of the relief granted in each particular case will, as heretofore, depend on the form of the action or proceeding in which the relief is sought; according as a plaintiff seeks to avail himself of his legal or his equitable remedy. It is therefore still necessary to consider separately what, according to the present practice, are the rights and remedies of a vendor or purchaser of real estate, both at Law and in Equity, if the contract is disputed or broken.

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Vendor in default, purchaser's rights of action.

Where there is default on the part of the vendor, the purchaser, as a general rule, may either rescind the contract, although under seal (*a*), and sue for the deposit (*b*) as for money had and received to his, the purchaser's use; or may affirm the contract, and sue for damages upon the ground of its non-performance (*c*); adding the common count for money had and received in respect of the deposit (if any has been paid) (*d*): and he has a good defence to an action by the vendor upon an I O U for part of the purchase-money (*e*): but he cannot, it seems, rescind the contract if the parties cannot be put *in statu quo*; as where, upon an agreement for a lease, the intended lessee has been in possession and has enjoyed part of the term (*f*): and a like decision has been come to where possession had been taken under a contract for the sale of the fee simple (*g*): but mere depreciation of the property is no defence if the purchaser has not had possession (*h*).

Agents may sue and be sued, when.

Where the contract, not being under seal, has been entered

(*a*) *Greville* v. *Da Costa*, Pea. Ad. C. 113.

(*b*) *Gosbell* v. *Archer*, 4 Nev. & M. 485: and for expenses, &c., *semble*, *De Bernardy* v. *Harding*, 8 Exch. 822.

(*c*) See *Moses* v. *Macferlan*, 2 Burr. 1011, and *Dutch* v. *Warren*, there cited; *Farrar* v. *Nightingal*, 2 Esp. 639; *Squire* v. *Tod*, 1 Camp. 293.

(*d*) Although part of the subject-matter of the contract has been enjoyed; see *Wright* v. *Colls*, 8 C. B. 158.

(*e*) *Wilson* v. *Wilson*, 14 C. B. 616.

(*f*) See *Hunt* v. *Silk*, 5 East, 449.

(*g*) *Blackburn* v. *Smith*, 2 Exch. 783.

(*h*) *Wilkinson* v. *Lloyd*, 7 Q. B. 27.

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into by an agent, the principal may sue upon it in his own name (*i*); unless the agent be specially described or referred to in the contract, in terms inconsistent with the idea of agency (*k*): so, also, a purchaser who has paid the deposit through an agent, can sue for it in his own name, although the fact of the agency were undisclosed (*l*): and, upon similar principles, it has been held that a nominal agent cannot sue, without first disclosing that he is in fact the principal (*m*): and his right to sue is even then doubtful, in cases where the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract; unless the contract has been partly performed with a knowledge by the defendants of who is the real principal (*n*): but a person contracting as agent can, if his authority be denied, sue in his own name (*o*): so, a person contracting as agent for an unnamed and unknown principal, may sue in his own name, unless the defendant contracted upon the faith of the agency (*p*).

Their powers and liabilities.

The considerations as to personal character or responsibility which often arise in respect to contracts for the performance of services, or the sale of goods, can seldom have much weight in the case of a contract for the sale of land. Where an agent contracts apparently on his own account—and *primâ facie*, a person, who signs in his own name, contracts as principal (*q*)—an action on the contract may be brought

(*i*) See 5 M. & S. 388, 391; *Higgins* v. *Senior*, 8 M. & W., see 844; *Humphrey* v. *Lucas*, 2 Car. & K. 152; *Phelps* v. *Prothero*, 1 Jur. N. S. 1170; 3 C. L. R. 906; 7 De G. M. & G. 722.

(*k*) See *Humble* v. *Hunter*, 12 Q. B. 310, where the agent was described as "owner."

(*l*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337.

(*m*) *Bickerton* v. *Burrell*, 5 M. & S. 383.

(*n*) See *Rayner* v. *Grote*, 15 M & W. 359, 365, 366.

(*o*) *Langstroth* v. *Toulmin*, 3 Stark. 145.

(*p*) *Schmalz* v. *Avery*, 15 Jur. 291, Q. B. As to liability of undisclosed principal for unauthorized act of agent, see *Edmunds* v. *Bushell*. L. R. 1 Q. B. 97.

(*q*) *Cooke* v. *Wilson*, 2 Jur. N. S. 1094; and see *Paice* v. *Walker*, L. R. 5 Exch. 173. As to the usage of the wool-trade in Liverpool as respects contracts entered into by an agent, see *Cropper* v. *Cook*, L. R. 3 C. P. 194; as to a broker being unable to sue in his own name upon contracts made by him as broker, see *Fairlie* v. *Fenton*, L. R. 5 Exch. 169.

against either him or his principal (*r*): but the plaintiff must, within a reasonable time, elect against which of them he will proceed (*s*). If the contract be under seal, the agent, although described as such, appears to be personally liable (*t*); but if it be not under seal, the agent describing himself and signing (*u*) as such, and naming his principal, is not personally liable unless he had no authority to make the contract, or in making it exceeded his authority (*x*): and even if a person, without authority, contract in the name of and as agent for another, it appears that he cannot be sued on the agreement, unless he be shown to have been really the principal: but if, professing to have authority, he enters into a contract, he would seem to be liable to the person with whom he contracts, for damages sustained by reason of his false assertion of authority (*y*), or by the breach of the implied assurance that he had the requisite authority; except in cases where he was originally authorized to act, and has entered into the contract, in ignorance, and without the means of knowing, that his authority has determined (*z*).

And since, as a general rule, a person who signs a contract in his own name without qualification, is *primâ facie* contracting on his own account (*a*), an agent entering into a contract should by his signature expressly state that he does

(*r*) *Higgins* v. *Senior*, 8 M. & W. 844; *Jones* v. *Littledale*, 6 Ad. & E. 486; see *Ex parte Hartop*, 12 Ves. 352; *Williamson* v. *Barton*, 2 Fost. & Fin. 544; 8 Jur. N. S. 341; *Fowkes* v. *Lamb*, 8 Jur. N. S. 385; *Paice* v. *Walker*, *ubi suprà*.

(*s*) *Smethurst* v. *Mitchell*, 28 L. J. Q. B. 241; 1 E. & E. 622.

(*t*) *Appleton* v. *Binks*, 5 East, 148; Sugd. 57.

(*u*) See *Paice* v. *Walker*, *ubi suprà*, where an agent *signing* without qualification was held bound, notwithstanding the disclosure of the agency in other parts of the contract; and see note to *Thomson* v. *Davenport*, 2 Smith's L. C. 4th edit., p. 344.

(*x*) *Downman* v. *Jones*, 9 Jur. 454, Exch. Ch.; *Lewis* v. *Nicholson*, 18 Q. B. 503; see *Humfrey* v. *Dale*, 5 Jur. N. S. 191; 26 L. J. Q. B. 137; 7 E. & B. 266.

(*y*) *Jenkins* v. *Hutchinson*, 13 Q. B. 744; *Lewis* v. *Nicholson*, *suprà*; and see *Collen* v. *Wright*, 7 Ell. & Bl. 301; 3 Jur. N. S. 363; affirmed, 8 Ell. & Bl. 647; 4 Jur. N. S. 357; *Randell* v. *Trimen*, 18 C. B. 786; *Pow* v. *Davis*, 7 Jur. N. S. 1010.

(*z*) See *Smout* v. *Ilberry*, 10 M. & W. 10; 2 Smith's L. C. 4th edit., p. 298.

(*a*) See 2 Smith's L. C., 6th edit., p. 344.

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so in that character: the fact of the agency being disclosed in the body of the contract has in some cases been held insufficient to protect him from personal liability (*b*).

Contracting party though signing as agent may be personally liable, when.

But if the terms of a contract are such, as in the opinion of the Court to show an intention that the contracting party shall be personally liable, the mere fact of his signing it "by authority of and as agent for" another person, does not necessarily save him from liability (*c*). Where money has been properly received by an agent, the action to recover it must be brought against the principal, although it may not have come to his hands (*d*): but a sum paid to an agent, under protest, in respect of a wrongful claim, may, it appears, be recovered from the agent (*e*).

Agent may sue for money fraudulently obtained from him.

In a case of payment improperly procured from an agent, by means of a fraudulent misrepresentation, either he or his principal may sue for its recovery (*f*). Of course a payment by a principal to his own agent does not bind the other principal except under special circumstances (*g*). In actions on the contract, the representations of the agent are the representations of the principal (*h*).

Auctioneer may be sued for deposit.

On a sale by auction the deposit, unless otherwise expressed, is paid to the auctioneer as stakeholder, not as agent for the vendor; and as such he may be sued for it (*i*): but, if paid to the vendor's solicitor, he holds it as agent for the vendor, and not as stakeholder (*k*). And it is a common practice for the auctioneer to receive and give a receipt for the deposit expressly as agent for the vendor.

(*b*) *Lennard* v. *Robinson*, 5 El. & B. 125; *Paice* v. *Walker*, L. R. 5 Exch. 173.

(*c*) *Lennard* v. *Robinson*, *ubi suprà*.

(*d*) *Duke of Norfolk* v. *Worthy*, 1 Camp. 337, and *Edden* v. *Read*, 3 Camp. 339; *Bamford* v. *Shuttleworth*, 11 Ad. & E. 926; *Hurley* v. *Baker*, 16 M. & W. 26; and see *Edgell* v. *Day*, *ubi infrà*, and cases there cited.

(*e*) *Smith* v. *Sleap*, 12 M. & W. 585.

(*f*) *Holt* v. *Ely*, 1 El. & B. 795.

(*g*) See *Heald* v. *Kenworthy*, 10 Exch. 739.

(*h*) Per Lord Campbell, 1 H. L. C. 615.

(*i*) *Lee* v. *Munn*, 1 Holt, 569; and see cases cited in *Edgell* v. *Day*, L. R. 1 C. P. 80.

(*k*) *Edgell* v. *Day*, *ubi suprà*.

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What purchaser can recover in action after rescinding contract.

In an action for money had and received, rescinding the contract, interest upon the deposit may, under a modern Act, be recovered from such time as demand of payment was made in writing giving notice to the vendor that interest would be claimed from the date of demand until payment (*l*); but it does not appear to be otherwise recoverable (*m*). Of course, the purchaser can make no claim in respect of any increase in the value of the estate; and it would seem, upon principle, to be equally clear that he cannot be prejudiced by any diminution in its value; although some old authorities leave the point doubtful (*n*).

What he can recover in action for damages founded on contract.

In an action for damages, affirming the contract, the purchaser, if the contract be proved to have been binding upon the vendor (*o*), can, under the special counts (*p*), recover his expenses of preparing, stamping, and entering into the agreement (*q*), of investigating and endeavouring to clear up the title (*r*), of searching for incumbrances, of comparing the abstract with the deeds (*s*), of preparing the conveyance, (if the sale go off by reason of a concealed incumbrance) (*t*), and interest upon his deposit (*u*), and upon the residue of his purchase-money, if lying idle (*x*); and he may recover the deposit itself under the common count for money had and received: and, although a Court of Equity may, pending a suit by the vendor for specific performance, restrain an action for the recovery of the deposit (*y*), it will not, as a general

(*l*) See 3 & 4 Will. IV. c. 42, s. 28.

(*m*) *Fruhling* v. *Schroeder*, 2 Bing. N. C. 77.

(*n*) Sug. 237.

(*o*) *Gosbell* v. *Archer*, 4 Nev. & M. 485; see as to this, *Jeakes* v. *White*, 6 Exch. 873, *suprà*, p. 200; *Simmons* v. *Heseltine*, 5 Jur. N. S. 270; 5 C. B. N. S. 554.

(*p*) See *Camfield* v. *Gilbert*, 4 Esp. 221, 223.

(*q*) *Hanslip* v. *Padwick*, 5 Exch. 615.

(*r*) See *Hanslip* v. *Padwick*, 5 Exch. 615. Including costs due, but not actually paid to his solicitor, *Richardson* v. *Chasen*, 10 Q. B. 756; and a letter from the purchaser's solicitor to the vendor's solicitor stating that unless certain evidence is supplied, and which is not supplied, the purchase must go off, does not affect the right to recover such expenses; *Hall* v. *Betty*, 5 Sc. N. R. 508.

(*s*) *Hodges* v. *Lord Litchfield*, 1 Bing. N. S. 492.

(*t*) Sug. 362.

(*u*) *Hodges* v. *Lord Litchfield*, *ubi suprà*; *Farquhar* v. *Farley*, 7 Taunt. 592.

(*x*) *Sherry* v. *Oke*, 3 Dowl. P. C. 349, 361.

(*y*) See *Kell* v. *Nokes*, 11 W.R. 979; 32 L. J. Ch. 785, where an injunction was granted.

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rule, grant an injunction (z), unless the vendor consent to the deposit being brought into Court (a), or unless there has been a decree, or the purchaser's demurrer has been overruled (b).

What he cannot recover.

The purchaser cannot, however, recover expenses incurred prior to the contract, or the costs of a survey (c), or of preparing a conveyance (d), (except under special circumstances,) or any allowance for loss by selling out of the funds (e), or for money laid out in repairs (f), or improvements (g), or the expenses of raising the purchase-money (h), or expenses incurred in expectation of the contract being completed (h), or the difference between his costs taxed as between party and party and his costs as between solicitor and client in an unsuccessful suit by the vendor for specific performance (i), or the costs of a suit by himself (the purchaser) for specific performance when the bill is dismissed without costs on the Chief Clerk certifying against the title (k); but where the bill is dismissed without costs on the ground of the vendor's mistake, the purchaser may, it seems, include his costs of suit in any action which he may bring for damages (l).

What damages are, as a general rule, recoverable at Law, for breach of contract.

The rule as to the damages which may be recovered for breach of a contract for the sale of land forms an exception from the ordinary rule as to damages for breach of contract. In the case of non-delivery of goods contracted to be sold, the purchaser is entitled to recover either such damages as may fairly be considered to have been the natural result of

(z) *Tanner* v. *Smith*, 4 Jur. 310. But see comments on this case in *Kell* v. *Nokes*, *ubi suprà*.

(a) *S. C.*, *Annesley* v. *Muggridge*, 1 Madd. 593.

(b) *Duke of Beaufort* v. *Glynn*, 1 Jur. N. S. 590.

(c) *Hodges* v. *Lord Litchfield*, *ubi suprà*. As to taxing costs of a survey, see *Bellas* v. *Harmer*, 3 De G. & Sm. 454.

(d) *S. C.*, *Jarmain* v. *Egelstone*, 5 Car. & P. 172.

(e) *Flureau* v. *Thornhill*, 2 W. Bla. 1078.

(f) *Bratt* v. *Ellis*, Sug. Append. No. 5.

(g) *Worthington* v. *Warrington*, 8 C. B. 134.

(h) *Hanslip* v. *Padwick*, 5 Exch. 615.

(i) *Hodges* v. *Lord Litchfield*, *ubi suprà*.

(k) *Malden* v. *Fyson*, 11 Q. B. 292.

(l) *Wood* v. *Scarth*, 2 K. & Jo. 33, 44.

the breach of the contract, or such as may reasonably be supposed to have been contemplated by both parties, at the time when they entered into the contract, as the probable result of a breach (*m*). Thus, where there was a contract for the sale of a threshing machine to be delivered on the 14th August, and the vendor knew the purpose for which it was required, but, notwithstanding repeated promises did not send it until the 10th of September, it was held that the purchaser was entitled to recover for loss sustained by injury to his wheat from rain, and for expenses incurred in carting, stacking, and kiln-drying it; but not for loss occasioned by a fall in the market price of wheat (*n*).

On contract for sale of land, no damages for loss of bargain, unless under special circumstances;

But on a contract for the sale of land, the exceptional rule first laid down in *Flureau* v. *Thornhill*, and confirmed by recent authorities, is that the purchaser is not entitled to damages for the loss of his bargain, where the vendor through want of title or otherwise (*o*), having acted *bonâ fide* (*p*), is unable to convey the estate (*q*); but can recover merely his expenses incurred in relation to the attempted purchase: and where a purchaser, upon the delivery of an abstract showing an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale; there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and the purchaser himself being equally negligent in reselling before he had tested its accuracy (*r*).

The rule introduced by *Flureau* v. *Thornhill* was, how-

(*m*) *Hadley* v. *Baxendale*, 9 Exch. 341.

(*n*) *Smeed* v. *Ford*, 5 Jur. N. S. 291; see too *Simons* v. *Patchett*, 7 E. & B. 568; 3 Jur. N. S. 742.

(*o*) See *Tyrer* v. *King*, 2 Car. & K. 149; a case of sale by an agent after the estate has been sold by his principal, but query whether this is essential. See Lord Chelmsford's judgment in *Bain* v. *Fothergill*.

(*p*) See 10 B. & C. 416, 421.

(*q*) *Flureau* v. *Thornhill*, *ubi suprà*; and see Lord Alvanley's remark, 3 Bos. & P. 167; *Clare* v. *Maynard*, 6 Ad. & E. 519; and *Hanslip* v. *Padwick*, 5 Exch. 615; *Bain* v. *Fothergill*, L. R. 7 Ed. Ir. Ap. 158.

(*r*) *Walker* v. *Moore*, 10 B. & C. 416.

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ever, in the subsequent case of *Hopkins* v. *Grazebrook* (s), considered not to apply to the case of a vendor who having a mere agreement for the purchase of an estate resold it at a profit, and was unable to complete the sub-contract by reason of want of title in the original vendor. So the case of a vendor contracting with a knowledge that he had no title was held not to be within the rule (t). So where a vendor who was merely a partial owner assumed to sell the entire estate without having obtained the consent of his co-owners, and the sale fell through in consequence of their refusal to concur in it, the purchaser was held entitled to recover his costs of investigating the title and of endeavouring to enforce the purchase, and also the difference between the contract price and the market price of the estate; and the price at which the estate was afterwards sold was treated as *primâ facie* evidence of the market price (u). And the same principle was recognized in other cases (v); although in some of them the circumstances were held to be such as took them out of the exception introduced by *Hopkins* v. *Grazebrook* from the rule established by *Flureau* v. *Thornhill*: which rule was considered to be rested upon an implied condition, incident to every contract for the sale of land, that, in the event of the title proving defective, no damages shall be awarded on account of the supposed goodness of the bargain (x): and doubts were entertained whether misconduct, though good ground for avoiding the contract, would justify a departure from the rule.

(s) 6 B. & C. 31. As to goods, see *Dunlop* v. *Higgins*, 1 H. L. C. 381; *Valpy* v. *Oakley*, 16 Q. B. 941; *Waters* v. *Towers* 22 L. J. Exch. 186; and see *Worthington* v. *Warrington*, 8 C. B. 134; *Hadley* v. *Baxendale*, 9 Exch. 341; *Paterson* v. *Ayre*, 13 C. B. 353; *Owen* v. *Oyle*, 14 C. B. 327; *Walker* v. *Broadhurst*, 21 L. T. 68; *Cory* v. *Thames Shipbuilding Co.*, L. R. 3 Q. B. 181; and see as to the measure of damages, *Spedding* v. *Nevell*, L. R. 4 C. P. 212, case of breach of contract to grant a lease.

(t) *Robinson* v. *Harman*, Exch. 850.

(u) *Godwin* v. *Francis*, L. R. 5 C. P. 295.

(v) See *Worthington* v. *Warrington*, 8 C. B. 134; *Pounsett* v. *Fuller*, 17 C. B. 640; *Sikes* v. *Wild*, 1 B. & S. 587, 4 *ibid.* 421.

(x) See judgment of Lord Wensleydale in *Walker* v. *Moore*, 10 B. & C. 416.

In a later case (y), where mortgagees had contracted to sell and to give possession on a specified day, and the purchaser was ready to complete, but the mortgagor refused to give up possession, and the vendors, rather than oust him, broke the contract, it was held by the Court of Exchequer Chamber, affirming the decision of the Court of Queen's Bench, that the purchaser, who had contracted to resell at a profit, was entitled to recover his deposit and expenses of investigating the title, and also damages for the loss of his bargain. Cockburn, C. J., in delivering the judgment of the Court, rested the exceptional rule, which was first laid down in *Flureau* v. *Thornhill*, on this ground, *viz.*, that in the complicated state of the law of real property, the owner of an estate is often unable to make out such a title as a purchaser is compellable to accept; and the parties are, therefore, only placed on fair terms, if on the purchaser rejecting the title the liability of the vendor is limited to the repayment of the deposit and the purchaser's expenses of investigating the title. But the Court, it is conceived unnecessarily for the purpose of deciding the case before it, which was a case not of inability but of wilful refusal on the part of the vendor, recognized *Hopkins* v. *Grazebrook* and *Robinson* v. *Harman* as authorities; and drew a distinction between the case of an undoubted owner, in actual possession, who fails to deduce a marketable title, and the case of a person who, having merely a contract for purchase, assumes to sell it as if he were the actual owner; the difficulty of making out the title, which exists in the one case, and which justifies the exceptional departure from ordinary principles, being wholly wanting in the other. It also laid down that the rule in *Flureau* v. *Thornhill* does not hold where the non-performance arises, not from a difficulty as to title, but from the fact of the vendor not having first secured to himself the property which he assumes to sell: and, *à fortiori*, it cannot apply where the failure either to make out the title, or to deliver possession arises, not from the vendor's inability, but from his

(y) *Engell* v. *Fitch*, L. R. 3 Q. B. 314; affirmed, L. R. 4 Q. B. 659.

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unwillingness, on the ground of expense or otherwise, to remedy the defect or to procure possession for the purchaser.

Bain v. *Fothergill.*

The whole question, however, has recently come before the House of Lords, on an appeal direct from the Court of Exchequer, in a case of *Bain* v. *Fothergill* (z); which seems to have been erroneously considered as identical with *Engell* v. *Fitch*, and for that reason was not brought before the Court of Exchequer Chamber. In *Bain* v. *Fothergill*, A., having contracted for the purchase of the W. R. mine, held under an agreement for a lease, with a clause against assignment without licence, entered into possession, and, without taking any assignment, agreed to sell to B. At the date of this sub-contract A. was aware that the assent of the lessors was necessary to complete his title, but did not anticipate any difficulty in obtaining it; and, treating the matter as unimportant, did not mention it to B. Subsequently the lessors, having first verbally promised, withdrew their assent, and the sale to B. consequently fell through. In an action by B. against A., for non-performance of the contract, the House of Lords, affirming the decision of the Court of Exchequer, held that B. could only recover the expenses which he had incurred, not damages for the loss of his bargain (a); and, after expressly overruling *Hopkins* v. *Grazebrook*, laid it down that the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be without exception (b): and Lord Chelmsford expressed it as his opinion, though it was not necessary to decide the point, that even where there has been *mala fides* on the part of the vendor the same rule still applies; and that the appropriate remedy, if full damages are claimed, is by an action for deceit, not by an action for breach of contract (c).

(z) L. R. 7 E. & Ir. Ap. 158.

(a) L. R. 6 Exch. 59.

(b) See the judgments, and the opinions given by the Common Law Judges on the points submitted to them.

(c) See 7 E. & Ir. Ap., p. 207.

Remarks on *Bain* v. *Fothergill.*

It will, however, be observed that this decision applies merely to cases where the vendor is *bonâ fide* unable to give a title, and does not conflict with the only point which was really decided in *Engell* v. *Fitch*, viz., that a purchaser is entitled to substantial damages from a vendor who, to save himself trouble or moderate expense, or from mere caprice, absolutely refuses, or, which is the same thing, wilfully neglects, to perform, to the best of his ability, his part of the contract (*d*). Notwithstanding some doubtful expressions in the judgments by Lords Chelmsford and Hatherley in *Bain* v. *Fothergill*, it can hardly be that this right will be denied to a purchaser, should the point again fairly arise for decision. Cases might be put in which an action for deceit would not lie; and where even a decree in a suit for specific performance, although supplemented by damages under Lord Cairns' Act, would afford no adequate remedy for a breach of contract consisting in the wilful refusal or neglect of the vendor to carry it into effect. A purchaser who has agreed to buy under the well-founded expectation of being able to realize large profits by means of a special mode of dealing with the property, which expectation is frustrated by the tortious act or omission of the vendor, may, under many supposable circumstances, reasonably object to be burdened, even at a greatly reduced price, with an estate which he has no longer any means of utilizing to a profit. It is hard to understand the principle, if there be any, upon which a purchaser, who has sustained a definite loss by reason of the wilful refusal of the vendor to do what he had agreed to do, should be deprived of his right to indemnification merely because the subject matter of the contract was real instead of personal property. It must not, however, be considered that in every case a vendor is bound to enter into doubtful litigation in order to perfect his title (*e*).

It has been held that where A. agrees to convey at a

(*d*) See L. J. Turner's judgment in *Williams* v. *Glenton*, L. R. 1 Ch. Ap. 209.

(*e*) See L. R. 1 Ch. Ap. 208.

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future date, for a consideration to be *immediately* given by B., and it appears on the face of the agreement that A. has not yet acquired a sufficient title, his engagement will be considered to be an absolute one; and if he is unable to perform it he is liable to full damages (*f*).

The rule applies only to a broken *contract*, not to a broken covenant in a conveyance.

This exceptional rule above referred to is, however, strictly confined to the case of a *contract* for the sale of land, and does not hold where the land has been actually conveyed, and the vendor has entered into a covenant for quiet enjoyment. Thus, where A., lessee in possession under a lease which had several years to run, obtained from B. a renewed lease to commence from the expiration of the subsisting term, and it subsequently transpired that B. had only a partial interest, and was incompetent to grant a reversionary lease, A. was held entitled to recover not merely the consideration money and the costs of preparing the void lease, but also the difference between the value of the lease which B. professed to grant, and the value of a lease for a shorter period and at an increased rent which was procured from the reversioners (*g*).

Want of title to part, when fatal.

The want of title to any part of the property is fatal at Law, unless the Court can make out a distinct contract in respect of the residue (*h*); or unless there is a condition for compensation, and the case can be brought within it (*i*). And although, on a purchase in lots, a separate contract arises upon every lot, a want of title to one will enable the purchaser to avoid the contract as to the others, if either they were complicated as respects enjoyment, or there was an understanding that he should not take any unless he could have all (*k*).

(*f*) *Wall* v. *City of London Real Property Co.*; L. R. 9 Q. B. 249.

(*g*) *Lock* v. *Furze*, L. R. 1 C. P. 441, in the Exchequer Chamber; reported in the C. P. 11 Jur. N. S. 726; 6 New Rep. 340. And see as to damages for breach of covenant, *Williams* v. *Earle*, 3 Q. B. 739; and *vide suprà*, pp. 770, 792.

(*h*) See *Johnson* v. *Johnson*, 3 Bos. & P. 162.

(*i*) *Suprà*, p. 790, *et seq.*

(*k*) See *Gibson* v. *Spurrier*, Pea. Ad. C. 49; *Chambers* v. *Griffiths*, 1 Esp. 150; *Dykes* v. *Blake*, 4 Bing. N. C. 463; *et infrà*, Ch. XVIII. s. 9.

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Death of purchaser, right of action goes to personal representatives.

Upon the death of the purchaser, the right to sue in respect of any damages which may have been sustained by his personal estate,—*e.g.*, loss of interest on the deposit, or the expenses of investigating the title,—descends upon his personal representative (*l*); and no action upon the agreement can be brought by the heir (*m*), whose only resource is a suit in Equity.

Death of vendor, purchaser's right of action against his representatives.

Upon the death of the vendor, his personal representatives alone are liable to an action at Law, if, as is usually the case, the agreement is not under seal.

Section 2.

(2.) *Vendor's remedies at Law against purchaser.*

Right of action in vendor or his representatives, against purchaser or his representatives for breach of contract.

Upon default by the purchaser, the vendor, or, if he be dead, his personal representatives, can sue the purchaser, or, if he be dead, his personal representatives, or his real representatives, if the agreement were under seal and the heirs were named therein, for damages sustained by the breach of the contract (*n*).

Vendor cannot recover entire purchase-money, if no conveyance.

Where a purchaser has been let into possession, and refuses to complete, the vendor cannot, if no conveyance has been executed, recover from him the whole amount of the purchase-money, but only the damages actually sustained by the breach of contract (*o*); for it would be unjust that the vendor should have both the purchase-money and the estate; but where he has executed, or offered to execute, the conveyance, and the purchaser has possession, the vendor may recover the whole amount of the purchase-money. His right of action is not taken away by a stipulation that if the purchaser should fail

(*l*) *Orme* v. *Broughton*, 10 Bing. 533.

(*m*) Sug. 238.

(*n*) *Vide suprà*, p. 796, as to the liability of the heir and devisees upon the covenant. See *De Bernardy* v. *Harding*, 8 Exch. 822 as to rescinding the contract and suing on a *quantum meruit* for expenses incurred.

(*o*) See *Laird* v. *Pim*, 7 M. & W. 474; and see *Moor* v. *Roberts*, 3 Com. Ben. N. S. 842.

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to comply with any of the conditions the deposit shall be forfeited as liquidated damages (*p*).

May recover title deeds.

If the title deeds have been delivered to the purchaser, in order that he might prepare the conveyance, the vendor may recover them at Law (*q*).

Purchaser in possession, whether liable for use and occupation if no title

If the purchase go off through defect of title in the vendor, the purchaser, if he have been let into possession, cannot be sued for use and occupation for the time during which the contract was pending, although the occupation have been a beneficial one (*r*): in the two principal reported cases it appears that the purchaser had paid, in one case all, and in the other part, of the purchase-money; but although this was in some degree relied on in the earlier, it does not seem to have been considered material in the later, of the two decisions: but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation (*s*). The purchaser when let into possession is only a tenant at will, although there may be a stipulation for payment of interest on the purchase-money until completion (*t*); but (unless under an agreement to quit in some specified event which has happened (*u*),) he cannot be ejected without notice (*x*).

Section 3.

Plaintiff, how far bound, &c.

(3.) *Plaintiff, how far bound to perform his part of the agreement before action.*

Performance of contract on part of plaintiff, how

As a general rule, the mutual engagements of the parties will be considered dependent on each other; and either must (unless discharged therefrom by the other (*y*),)

(*p*) *Icely* v. *Grew*, 6 Nev. & M. 467.

(*q*) *Parry* v. *Frame*, 2 Bos. & P. 451.

(*r*) *Kirtland* v. *Pounsett*, 2 Taunt. 145; *Winterbottom* v. *Ingham*, 7 Q. B, 611; and see Sug. 179.

(*s*) *Howard* v. *Shaw*, 8 M. & W. 118.

(*t*) *Doe* v. *Chamberlaine*, 3 M. & W. 14.

(*u*) *Doe* v. *Sayer*, 3 Camp. 8.

(*x*) See 1 M. & W. 700; *Right* v. *Beard*, 13 East, 210; and see *Doe* v. *Caperton*, 9 Car. & P. 112; *Doe* v. *Chamberlaine*, 3 M. & W. 14.

(*y*) See *Jones* v. *Barkley*, Doug. 659; *Laird* v. *Pim*, 7 M. & W. 474; *Cort* v. *Ambergate, &c., R. Co.*, 17 Q. B. 127; if the agreement is by deed, the discharge must also be under seal; see 5 Exch. 711.

perform his liabilities before he seeks to enforce his rights under the contract. So that, on the one hand, the purchaser cannot, in general, sue upon the agreement without tendering the conveyance (z), and the sum (if any) due in respect of the purchase-money and interest (a);—unless the vendor have neglected to furnish or verify (b) his abstract of title, or have shown a bad title (c), or, by conveying away the estate (d) or otherwise (e), have disabled himself from completing the contract:—and, on the other hand, it has been held that the vendor, if he sue merely upon the agreement, and not upon some security which he has taken for the purchase-money (f), must have shown a good title and executed, or offered to execute (g), or, according to a modern decision (h), have been ready and willing to execute, a conveyance in the terms of the contract; the rule, in the absence of stipulation, being, that the purchaser must prepare and tender the conveyance (i): and even, in the case of a compulsory purchase under the Lands Clauses Consolidation Act, no action can be maintained for the compensation money, until a conveyance has been executed (k).

far necessary to support action.

The same principle applies to every case where the mutual stipulations of vendor and purchaser are interdependent. Thus, where by a memorandum in writing, A. agreed to sell to B. certain seams of coal, and to purchase from B. all the

Mutuality of the obligations.

(z) See *Knight* v. *Crockford*, 1 Esp. 190. See too *Guardians of the East London Union* v. *Metropolitan R. Co.*, L. R. 4 Exch. 309.

(a) Sug. 241, and cases there cited.

(b) See *Berry* v. *Young*, 2 Esp. 640, n.; *Clarke* v. *King*, 2 Car. & P. 286.

(c) See *Seaward* v. *Willock*, 5 East, 202.

(d) *Lovelock* v. *Franklyn*, 8 Q. B. 371; *Knight* v. *Crockford*, 1 Esp. 190.

(e) See *Duke of St. Albans* v. *Shore*, 1 H. Bl. 270; *Caines* v. *Smith*, 15 M. & W. 189; *Short* v. *Stone*, 3 Dow. & L. 580; *S. C.*, 8 Q. B. 358.

(f) See *Moggridge* v. *Jones*, 14 East, 486; *Spiller* v. *Westlake*, 2 B. & Ad. 155.

(g) *Phillips* v. *Fielding*, 2 H. Bl. 123; *Laird* v. *Pim*, 7 M. & W. 474.

(h) *Poole* v. *Hill*, 6 M. & W. 835, 841; and see Chitty on Contracts, and *Thames Haven Co.* v. *Brymer*, 5 Exch. 711: but see Sug. 240.

(i) *Stephens* v. *De Medina*, 4 Q. B. 422; *Poole* v. *Hill*, 6 M. & W. 835; and compare *Stanley* v. *Hemmington*, 6 Taun. 461.

(k) *Guardians of East London Union* v. *Metropolitan R. Co.*, L. R. 4 Exch. 309.

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May be inferred from the nature of the transaction.

coals which he might require, it was held that the stipulations were concurrent, and that B. could not sue A. for not taking the coal, without averring performance of, or a readiness to perform, his part of the agreement (*l*). And the mutuality of the obligations may be inferred from the nature of the transaction: thus, where in an agreement for a lease it was provided that the lessors should supply to the lessees the whole of their chlorine-still waste at a given rate, and should not, during the tenancy, part with any of it to other persons, it was held that the promise to sell implied a promise to take, and that the lessees were bound to take the whole of the waste (*m*).

But the contract may show that the stipulations are independent.

But, of course, the contract *may* be so worded as to show that the mutual stipulations were, to a certain extent, independent; it being a general rule, that if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance: for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent (*n*). For instance, where a vendor agreed that he would, within one month from the date of the contract, or from being required so to do, deliver an abstract of title and deduce a clear title, and the purchaser agreed to pay part of the purchase-money down, and the residue on or before four years after date, with interest payable half-yearly on certain fixed days, it was held, that the vendor could sue for interest which had become due, although no abstract might have been delivered (*o*). So, where the purchaser agreed to

(*l*) *Bankart* v. *Bowers*, L. R. 1 C. P. 484; and see *Atkinson* v. *Smith*, 14 M. & W. 695.

(*m*) *Bealey* v. *Stuart*, 8 Jur. N. S. 389; and see and distinguish *Sykes* v. *Dixon*, 9 Ad. & E. 693.

(*n*) *Pordage* v. *Cole*, 1 Wms. Saund. 320 *b*, n; see 9 C. B. 114; *Mattock* v. *Kinglake*, 2 Per. & Dav. 343; *Porcher* v. *Gardner*, 8 C. B. 461; and *Thames Haven Company* v. *Brymer*, 5 Exch. 710; *Wood* v. *Copper Miners' Co.*, 14 C. B. 428; see too *Roberts* v. *Brett*, 2 Jur. N. S. 592; affirmed, 6 Jur. N. S. 146; and see cases cited 2 Smith's L. C., 6th edit., p. 12.

(*o*) *Dicker* v. *Jackson*, 6 C. B. 103, 114; and see *Sibthorp* v. *Brunel*,

pay the purchase-money on a specified day, and the vendor agreed, upon payment of the money, to convey the land, it was held that the latter could sue for the money without tendering a conveyance (*p*).

Refusal by either party to perform, is an immediate breach.

It has been held that if one of the parties to the contract absolutely refuses to perform, or renders himself incapable of performing, his side of it, this amounts to an immediate breach; and that he may be sued at once, although the day fixed for performance has not arrived (*q*): but it must not be inferred from this decision that, in every case, the refusal of one party to complete will dispense with the performance by the other of his obligations under the contract (*r*).

Action on a bill or note for consideration—what a defence to.

It has been held that where a bill or note is given as the consideration for a lease, and the lessee is let into possession, the refusal of the lessor to execute the lease is no defence to his action on the bill or note: for he is not bound to execute till the price is paid, and as the lessee was let into possession the consideration fails in part only; and the sum to be allowed for such failure is matter not of mere calculation, but of unliquidated damages (*s*). So, on a sale, the fact of no conveyance having been executed, is no defence to an action on a bill or note for the purchase-money; at least, if it was not the vendor's fault that he did not convey (*t*): but it would be an answer to the action that the purchaser had a right to rescind the contract, and had in fact rescinded

3 Exch. 826; *Lloyd* v. *Lloyd*, 2 Myl. & Cr. 192; *Wilks* v. *Smith*, 10 M. & W. 355; *Friar* v. *Grey*, 5 Exch. 584; 20 L. J. 365, Exch. Ch.; 4 H. L. C. 565; *Lindsay* v. *Direct London, &c., R. Co.*, 1 Pr. R. 529, 537; but see *Manby* v. *Cremonini*, 2 Pr. R. 550; 6 Exch. 808; *Bland* v. *Crowley*, 6 Exch. 522; *Weedon* v. *Woodbridge*, 13 Q. B. 462; *Neale* v. *Ratcliff*, 15 Q. B. 916; *Eastern C. R. Co.* v. *Philipson*, 16 C. B. 1; *Stratton* v. *Pettit*, *ib.* 420; *Bond* v. *Rosling*, 8 Jur. N. S. 78; *Phelps* v. *Protheroe*, 3 C. L. R. 906; see *S. C.*, in Equity, 7 De G. M. & G. 722; *Anderson* v. *Baigent*, 4 W. R. 265.

(*p*) *Yates* v. *Gardiner*, 20 L. J. 327, Exch.

(*q*) *Hochster* v. *De la Tour*, 22 L. T., Q. B. 455; and cases cited in judgment.

(*r*) *Reid* v. *Hoskins* (in error), 26 L. J. Q. B. 5; 6 E. & B. 953.

(*s*) *Moggridge* v. *Jones*, 14 East, 486; Bayley on Bills, 506, 6th ed.

(*t*) Bayley on Bills, 507. See *Spiller* v. *Westlake*, 2 B. & Ad. 155, 157.

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it (*u*): at any rate if the bill were in the hands of the vendor or his agent (*x*).

Deposit.

It seems to be the better opinion, that even where there is no condition respecting the forfeiture of the deposit, and the purchaser by his own default loses his right to enforce the contract, he has no right to recover his deposit; and will not acquire such right by reason of the estate being subsequently sold by the vendor (*y*); unless the contract provides for the payment of liquidated damages in the event of any breach (*z*). Where, however, there is no binding contract, and the purchaser refuses to complete, he is entitled to the return of his deposit (*a*).

Section 4.

(4.) *As to the agreement;—how affected by parol evidence.*

As to agreement;—how affected by parol evidence.

What a sufficient contract within Statute of Frauds.

We have already considered (*b*) what is a sufficient agreement within the Statute of Frauds: we may here remark, that the doctrine acted upon in Courts of Equity as to parol agreements being taken out of the Statute by part performance is not recognized by a Court of Law (*c*).

No parol variation of contract allowed at Law.

The contract, as originally entered into, cannot, at Law, be altered by evidence of a parol variation in favour of either plaintiff or defendant (*d*); but an action may lie on a parol agreement, which varies, but does not actually conflict with, the terms of the written instrument (*e*): and, as we have already seen (*f*), parol evidence may be admitted to prove that an agreement, absolute in form, was intended to operate only on the happening of certain contingencies.

(*u*) Bayley on Bills, 507.

(*x*) Chitty on Bills, 79.

(*y*) See Sug. 40; and *Dupree* v. *Bedborough*, 4 Giff. 479, a sale by the Court; but see *Palmer* v. *Temple*, 1 Per. & Dav. 379; 9 Ad. & E. 508.

(*z*) *Palmer* v. *Temple*, *ubi suprà*.

(*a*) *Casson* v. *Roberts*, 31 Beav. 613, case of parol contract.

(*b*) *Suprà*, Ch. VII.

(*c*) Sug. Ch. IV., s. 7.

(*d*) See *Goss* v. *Lord Nugent*, 5 B. & Ad. 58; *Henson* v. *Coope*, 3 Sc. N. R. 48; *Stead* v. *Dawber*, 10 Ad. & E. 57; *Marshall* v. *Lynn*, 6 M. & W. 109; *suprà*, p. 110; *Emmet* v. *Dewhirst*, 3 Mac. & G. 596, 597; *Canham* v. *Barry*, 15 C. B. 597; *Noble* v. *Ward*, L. R. 1 Ex. 117; affirmed, L. R. 2 Ex. 135.

(*e*) *Nash* v. *Armstrong*, 7 Jur. N. S. 1060.

(*f*) *Vide suprà*, p. 280.

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Parol evidence, how far admissible in explanation of contract.

As respects the reception of parol evidence in order to explain agreements of doubtful or ambiguous meaning, the following seems to be the general result of the authorities. The Courts will always, if necessary, receive evidence to enable them to decipher, or, if written in a foreign language, to interpret, the instrument; that is, to ascertain what are the expressions, or the English equivalents to the expressions, which the parties have actually used. They will also receive parol evidence of the meaning which local custom (*g*), or professional or trade usage (*h*), or the former practice of the parties themselves (*i*), has attached to particular expressions: so as, in fact, to ascertain what is (with reference to the particular subject-matter of the contract) their strict and primary meaning (*k*);—unless such a construction would be inconsistent with the terms of the instrument (*l*), or some express provisions of the Legislature; for instance, local custom cannot vary the statutory meaning of expressions referring to weights and measures (*m*);—or to annex any customary incidents to the contract which are not expressly or impliedly excluded by the terms of the written instrument (*n*). Where construing the expressions according to such strict and primary meaning would render them insensible with reference to extrinsic circumstances, the Courts will receive parol evidence of the circumstances and situations of the parties and the

(*g*) *Smith* v. *Wilson*, 3 B. & Ad. 721; *Doe* v. *Benson*, 4 B. & Ald. 588, where evidence was admitted to show that by Lady-day was meant old Lady-day.

(*h*) *Clayton* v. *Gregson*, 4 Nev. & M. 602; *Hutchison* v. *Bowker*, 5 M. & W. 535; and see *Lewis* v. *Marshall*, 8 Sc. N. R. 477, 493; *Sotilichos* v. *Kemp*, 3 Exch. 105; *Malcolm* v. *Scott*, 3 Mac. & G. 29; *Smith* v. *Thompson*, 8 C. B. 44; *Simpson* v. *Margitson*, 11 Q. B. 32; *Fawkes* v. *Lamb*, 8 Jur. N. S. 385; *Newell* v. *Radford*, L. R. 3 C P. 52.

(*i*) *Bourne* v. *Gatliff*, 11 Cl. & F. 45, 70.

(*k*) See *Colpoys* v. *Colpoys*, Jac. 463; *Simpson* v. *Margitson*, 11 Q. B. 23; *Doe* v. *Langton*, 2 B. & Ad. 695; *Doe* v. *Birch*, 1 M. & W. 402; *Parker* v. *Gossage*, 2 Cr. M. & R., 617.

(*l*) See *Spartali* v. *Benecke*, 10 C. B. 212; *Field* v. *Lelean*, 7 Jur. N. S. 918.

(*m*) See *Master, &c., of St. Cross* v. *Lord Howard de Walden*, 6 T. R. 338.

(*n*) *Hutton* v. *Warren*, 1 M. & W. 466; *Syers* v. *Jonas*, 2 Exch. 111; *Spartali* v. *Benecke*, 10 C. B. 212; *Humfrey* v. *Dale*, 5 Jur. N. S. 191.

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state of the property at the date of the agreement, for the purpose of ascertaining whether such expressions have not been used in some secondary sense consistent with such circumstances, &c. (*o*). So, where an agent contracts, parol evidence is admissible to prove who is the principal (*p*); or to show that the apparent agent is himself the principal (*q*). And where, as respects all or any part of the subject-matter of the contract (*r*), or the identity of places, documents (*s*), or persons (*t*) referred to, there is a *latent* ambiguity—that is, where the words of the agreement, although certain in point of grammatical construction and apparently definite, are rendered of doubtful (*u*) application by circumstances which appear *aliunde* (*x*), or according to a modern decision (*y*), upon the face of the agreement itself,—parol evidence of the *intention* of the parties at the date of the agreement is admissible, in order to identify the estate, document, plan, or other thing or person intended: but such evidence is not admissible in aid of a *patent* ambiguity; *i.e.*, an ambiguity which is either directly suggested by the terms of the instrument (*z*), or is occasioned by the grammatical uncertainty of the expressions therein used: nor *à fortiori*, to control the clear effect of an unambiguous instrument (*a*).

(*o*) See *Eden* v. *Earl of Bute*, 3 Bro. P. C. 679; *Allen* v. *Cameron*, 1 Cr. & M. 832; *Simpson* v. *Henderson*, M. & Malk. 300; and *Shore* v. *Wilson*, 9 Cl. & F. 355; *Innes* v. *Sayer*, 3 Mac. & G. 614; *Newell* v. *Radford*, L. R. 3 C. P. 52.

(*p*) *Morris* v. *Wilson*, 5 Jur. N. S. 168; *Humfrey* v. *Dale*, *ib.* 191.

(*q*) *Schmalz* v. *Avery*, 16 Q. B. 655; *Carr* v. *Jackson*, 7 Exch. 382.

(*r*) *Longchamps* v. *Fawcett*, Peak. Ca. 101; *Doe* v. *Burt*, 1 T. R. 701; *Jones* v. *Newman*, 1 W. Bla. 60; *Murray* v. *Parker*, 19 Beav. 305.

(*s*) *Hodges* v. *Horsfall*, 1 Russ. & M. 116; *Shortrede* v. *Cheek*, 1 Ad. & E. 57; *Morris* v. *Wilson*, 5 Jur. N. S. 168; *Commins* v. *Scott*, L. R. 20 Eq. 11.

(*t*) See *Doe* v. *Westlake*, 4 B. & Ald. 57.

(*u*) There must be a reasonable and not a merely conjectural doubt; *Clifton* v. *Walmesley*, 5 T. R. 564; *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138, 149; *Smith* v. *Jeffreys*, 15 M. & W. 561. As to evidence in explanation of the ambiguity, see *Thomas* v. *Thomas*, 6 T. R. 671; *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72; *Doe* v. *Hiscocks*, 5 M. & W. 363, 369.

(*x*) *Doe* v. *Morgan*, 1 Cr. & M. 235.

(*y*) *Doe d. Gord* v. *Needs*, 2 M. & W. 129; and see *Colpoys* v. *Colpoys*, Jac. 464.

(*z*) See *Brodie* v. *St. Paul*, 1 Ves. J. 326; and see 1 Sch. & L. 36.

(*a*) *Loughor Co.* v. *Williams*, 3 C. L. R. 163.

Lyle v. *Richards.*

In a late case in the House of Lords (*b*) the boundary in a mining sett was described as "a line drawn from J. V.'s house" to a bound-stone, and the parcels were described by reference to an endorsed plan. The site of J. V.'s house, from the north-east corner of which the line was drawn, was inaccurately shown on the plan, and the dispute lay between two coterminous grantees, as to what was the true boundary between their respective setts; the question depending upon what part of the house was to be taken as the starting point for the line. It was held by Lords Cranworth and Chelmsford that the plan, though inaccurate as to the site of the house, clearly indicated that the line was to be drawn from its north-east corner; and that the judge below was right in directing the jury that the line was to be drawn as marked on the map. Lord Westbury dissented from this view, and held that as the error in the plan could not be discovered without the aid of extrinsic evidence, there was a latent ambiguity, which was matter of fact to be determined by a jury upon the evidence, not matter of law depending upon the construction of the deed. A plan is part of a deed to be interpreted, like every other portion of the instrument, by the judge; but, as was observed by Lord Westbury, the question here was not one of the interpretation of the deed itself, or even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects, one of which was proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence (*c*). The latter seems the sounder view: the construction of the plan was matter of law, so long only as its accuracy was unimpeached: being proved to be inaccurate, it became a question of fact what parcels were comprised in the lease; for it did not follow that, because the boundary

(*b*) *Lyle* v. *Richards*, L. R. 1 E. & Ir. Ap. 222; see and consider this

(*c*) See judgment of Lord Westbury, *ib.* 241.

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line was drawn from the north-east corner of the house as incorrectly represented on the plan, it would have been drawn from the same point, if the true site of the house had been shown. A plan, though a useful adjunct to a specific description, can seldom, especially when drawn on an inadequate scale, show with strict accuracy the objects and relative situations which it purports to represent; and in every case there ought to be an independent substantive description of the site, quantity, and dimensions of the property intended to be conveyed.

Agreement merely collateral to the land may be proved by parol.

An agreement merely collateral to the land, not being within the Statute of Frauds (*d*), may be supported by parol evidence, if not at variance with the terms of a written contract relating to the land. Thus where a lessee before executing a lease stipulated that the rabbits on the farm should be destroyed, and that a clause to that effect should be inserted in the lease, but on the lessor's assurance that the rabbits should be destroyed, signed the lease without insisting on the alteration, parol evidence in support of the agreement was admitted in an action by the lessee against the lessor for damage done by the rabbits (*e*). So a consideration, not expressed but not inconsistent with the consideration which is expressed, may be proved by parol (*f*).

Subsequent acts of the parties immaterial.

It seems to be the better opinion that, both at Law (*g*) and in Equity (*h*), the acts of the parties subsequent to the making of the agreement, are, as such, inadmissible for the purpose of determining its meaning.

Want of date.

As a general rule an instrument without a date operates from the date of its execution; but parol evidence is admis-

(*d*) *Vide suprà*, p. 200.

(*e*) *Morgan* v. *Griffith*, L. R. 6 Exch. 70; and see *Leather Cloth Company* v. *Hieronimus*, L. R. 10 Q. B. 140; *Angell* v. *Duke*, L. R. 10 Q. B. 174.

(*f*) See *Leifchild's case*, L. R. 1 Eq. 231; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138.

(*g*) *Iggulden* v. *May*, 5 East, 237; *Simpson* v. *Margitson*, 11 Q. B. 23; *Lewis* v. *Nicholson*, 18 Q. B. 503.

(*h*) *Monro* v. *Taylor*, 8 Ha. 56.

sible to show that it was not intended to take effect until a future period (*i*): so also, to show that the execution of a dated instrument was merely conditional (*k*).

(5.) *Production of agreement when compelled.*

Section 5.

Production of agreement, when compelled.

Production of contract when ordered.

If the only executed copy of the agreement is in the hands of a defendant (*l*), or of a third party (*m*), either party can, as of course, procure an order, before trial, for its previous production for the purpose of inspection and of being stamped: and where the sole uncopied original was surreptitiously obtained from the plaintiff by the defendant, who swore that he had lost it, he was ordered to produce a copy for the purpose of being stamped, and was precluded from setting up the want of a stamp on the unstamped original (*n*); but this has been since overruled (*o*). Where two original copies where retained, one by each party, the party who lost his copy could not, at Law, compel the other party to produce his copy at the trial, or for the purpose of inspection; but was driven to a bill of discovery (*p*): and it was doubtful whether a Court of Law would compel its production for the mere purpose of stamping (*q*). Both these points are met by recent enactments (*r*), enabling Courts of Law to compel the inspection of documents (*s*), their production for the purpose of being stamped, and the furnishing of copies, whenever Equity would grant discovery. These statutory powers neither take away the

(*i*) *Davis* v. *Jones*, 25 L. J. C. P. 91.

(*k*) *Gudgen* v. *Besset*, 3 Jur. N. S. 212; which see as to "delivery."

(*l*) *Blakey* v. *Porter*, 1 Taunt. 386; *King* v. *King*, 4 Taunt. 666; *Hall* v. *Bainbridge*, 3 Dowl. & L. 92; *Bateman* v. *Phillips*, 4 Taunt. 157.

(*m*) *Gigner* v. *Bayly*, 5 Moore, 71.

(*n*) *Bousfield* v. *Godfrey*, 5 Bing. 418; and see, in Equity, *Blair* v. *Ormond*, 1 De G. & S. 428; *Smith* v. *Henley*, 1 Ph. 391.

(*o*) *Rankin* v. *Hamilton*, 15 Q. B. 187; but see now 14 & 15 Vict. c. 99, s. 6.

(*p*) *Street* v. *Brown*, 6 Taunt. 302; *Att.-Gen. of Prince of Wales* v. *Lambe*, 11 Beav. 213.

(*q*) See *Travis* v. *Collins*, 2 Cro. & J. 625; *Neale* v. *Swind*, 2 Cro. & J. 278; in Equity, *Beyson* v. *W. & B. C. Co.*, 20 L. T. 154. See Mr. Tilsley's remarks, Tils. on S. L., p. 386.

(*r*) 14 & 15 Vict. c. 99, s. 6; and see 17 & 18 Vict. c. 125, s. 50. See too 23 & 24 Vict. c. 128.

(*s*) See next paragraph.

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previous common-law jurisdiction of the Courts (*t*), nor interfere with the equitable jurisdiction as to discovery (*u*).

What documents will be ordered to be produced.

The Courts of Law will not, it seems under these Acts, grant discovery of documents which are not material for the purposes of pleading, or are not properly admissible as evidence (*x*); and the affidavit of the party requiring production must describe the documents with sufficient certainty; and must show reasonable grounds for believing that they are in the possession or power of the opposite party (*y*): nor will production be ordered, where it is sought, not for the purposes of the action in which the application is made, but with some ulterior object, as, *e. g.*, for the purpose of maintaining another action (*z*). The application may, it seems, be made before plea pleaded (*a*); but no discovery will be granted except on the affidavit of the litigant party himself, except in the case of a corporation aggregate, where the affidavit of the attorney is sufficient (*b*). A place for production should be specified (*c*); the party requiring pays the costs of inspection (*d*).

Discovery, when and how granted.

Document produced need not be proved by attesting witnesses.

The party who upon notice procures the production at trial of the agreement in the hands of the other party, need not call the subscribing witness to prove its execution (*e*):

(*t*) *Black* v. *Gompertz*, 7 Exch. 37; *Hunt* v. *Hewitt*, 7 Exch. 236; *Hill* v. *Philp*, *ib.* 232.

(*u*) *British Empire Shipping Co.* v. *Somes*, 3 K. & Jo. 433; *Barry* v. *Croskey*, 2 J. & H. 30.

(*x*) *Rayner* v. *Allhusen*, 15 Jur. 1061; *Alsworthy* v. *Norman*, *ib.* 1062, n.; and see *Pepper* v. *Chambers*, 7 Exch. 226; *Thompson* v. *Robson*, 26 L. J. Exch. 367; *Woolley* v. *Pole*, 14 C. B. N. S. 538.

(*y*) *Hewett* v. *Webb*, 2 Jur. N. S. 1189. The party from whom production is sought cannot be compelled to state on oath what documents are in his possession. See *Rayner* v. *Allhusen*, 2 P. R. 605.

(*z*) *Temperley* v. *Willett*, 2 Jur. N. S. 519.

(*a*) Chitty's Archbold, p. 1423.

(*b*) *Kingsford* v. *G. W. R. Co.*, 16 C. B. N. S. 761; and see *Hewett* v. *Webb*, *ubi suprà*, where the party was abroad. And see as to the sufficiency of the affidavit, *Sneider* v. *Mangino* 7 Exch. 229; *Pepper* v. *Chambers*, *ib.* 223; *Bray* v. *Finch*, 26 L. J. Ex. 91.

(*c*) *Christian* v. *Horwood*, 15 Jur. 1064.

(*d*) *Hill* v. *Philp*, 7 Exch. 232; and see as to the statute generally, *Hunt* v. *Hewitt*, *ib.* 236. As to documents protected on the ground of privilege, see *Woolley* v. *North London R. Co.*, L. R. 4 C. P. 602, and cases there cited.

(*e*) *Bradshaw* v. *Bennett*, 5 Car. & P. 48.

if a copy be shown to have been stamped, and be not produced upon notice, the Court will receive secondary evidence of its contents (*f*).

By the Rules of Procedure under the Judicature Act, 1873, every party to an action or other proceeding may at any time before or at the hearing thereof, by notice in writing, require production of any document which the other party may have referred to in his pleadings or affidavit; and the party to whom the notice is given, if he decline to produce the document is not to be at liberty to use it as evidence in his own behalf, unless he can satisfy the Court that it relates only to his own title, or that he had other good grounds for refusing to produce it (*g*); and the Court has a general power, pending any action or proceeding, of compelling production of documents relating to the matters in question, and of dealing with them, when produced, as it thinks fit (*h*).

Section 6.

(6.) *Grounds of defence at Law, the agreement being admitted.*

Grounds of defence at Law, &c.

Grounds of defence to action on contract duly executed.

Supposing the agreement and its breach to be *primâ facie* capable of proof against the defendant, he may, by way of defence to the action, show, either that the agreement was originally invalid, or that it has since its execution ceased to be binding, or that satisfaction has been made for its breach: or that it was to be conditioned upon some event which has not occurred (*i*).

Original invalidity of contract;

For instance, he may show that, at the time of the execution of the contract, he was under some personal incapacity to contract (*k*); or was under duress (*l*); or was fraudulently induced to enter into it (*m*); in which case it

(*f*) *Garnons* v. *Swift*, 1 Taunt. 507; *Waller* v. *Horsfall*, 1 Camp. 501.

(*g*) Rule 26.

(*h*) Rule 27.

(*i*) *Pym* v. *Campbell*, 6 Ell. & B. 370.

(*k*) *Suprà*, Ch. I.; see as to intoxication, *Gore* v. *Gibson*, 13 M. & W. 623.

(*l*) Bac. Abr. tit. "Duress."

(*m*) *Vide suprà*, p. 98, *et seq.*; and *Haigh* v. *De La Cour*, 3 Camp. 319; *Emanuel* v. *Dane*, *ib.* 299; *Solomon*

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is voidable at his election (*n*); or that it contains provisions against public policy (*o*); or was entered into for or with reference to some unlawful purpose (*p*). But a contract legal in its inception cannot be rendered illegal by matter *ex post facto* (*q*); although it may be avoided by a collateral and cotemporary illegal agreement (*r*).

or subsequent waiver;

So, admitting its original validity, he may show that it has been since avoided by having without his concurrence, been altered by the plaintiff in a material part (*s*); or by a waiver in writing duly signed by the plaintiff (*t*), before the breach which is relied on in the action. Where a parol has been substituted for a written agreement, no action will lie on the substituted agreement (*u*); and it seems to be now well settled (*x*) that a verbal waiver of a written

Which, if verbal, is no

v. *Turner*, 1 Stark. 51; *Hutchinson* v. *Morly*, 7 Scott, 341; *Cornfoot* v. *Fowke*, 6 M. & W. 358; *Canham* v. *Berry*, 15 C. B. 597; actual fraud in the agent, in respect to matters within the scope of his authority (*Coleman* v. *Riches*, 16 C. B. 104), is the same as fraud in the principal, *Doe d. Willis* v. *Martin*, 4 T. R. 39; *Wilson* v. *Fuller*, 3 Q. B. 68; see 1 H. L. C. 615; and see *National Exchange Co.* v. *Drew*, 2 Macq. 108, 145.

(*n*) *White* v. *Gaider*, 10 C. B. 919.

(*o*) *Vansittart* v. *Vansittart*, 4 K. & Jo. 62.

(*p*) *Bartlett* v. *Vinor*, Carth. 252; *Langton* v. *Hughes*, 1 M. & S. 596; *De Begnis* v. *Armistead*, 10 Bing. 107; *Gas Light Company* v. *Turner*, 8 Scott, 609; *Ritchie* v. *Smith*, 6 C. B. 462; *Fisher* v. *Bridges*, 3 El. & B. 642; and see *Ewing* v. *Osbaldiston*, 2 Myl. & Cr. 53: and note, anything to which a Statute attaches a penalty is unlawful, although not expressly prohibited, *S. C.*; and see *Duke of Roxburgh* v. *Ramsay*, 7 Bell's Ap. C. 248; *Appleton* v. *Campbell*, 2 Car. & P. 347; *M'Gregor* v. *Dover, &c., R. Co.*, 17 Jur. 21; *Tallis* v. *Tallis*, 1 El. & B. 391; *Taylor* v. *Crowland Gas Co.* 10 Exch. 293; *Jones* v. *Orchard*, 3 C. L. R. 1275.

(*q*) *Fraser* v. *Hill*, 1 Macq. H. L. C. 392; *Armstrong* v. *Armstrong*, 3 Myl. & K. 64.

(*r*) *Armstrong* v. *Lewis*. 2 Cro. & M. 298; but an estate conveyed cannot be divested by the existence of an unlawful purpose on the part of the grantee, and fraudulent misrepresentation by him; *Feret* v. *Hill*, 15 C. B. 142.

(*s*) *Suprà*, p. 236.

(*t*) See *Goss* v. *Lord Nugent*, 2 Nev. & M. 28; *Harvey* v. *Grabham*, 6 Nev. & M. 754, 762.

(*u*) *Stead* v. *Dawber*, 10 Ad. & E. 57; *Goss* v. *Lord Nugent*, 5 B. & Ad. 58, 66.

(*x*) *Vide Noble* v. *Ward*, *infra*; *Moore* v. *Campbell*, 10 Ex. 323; *Goss* v. *Lord Nugent*, and *Stead* v. *Dawber*, *ubi suprà*; *Marshall* v. *Lynn*, 6 M. & W. 109; but see *Clark* v. *Upton*, 3 Man. & R. 89, where the purchaser's action was held to be barred by his own application to the vendor to rescind the contract, and which the latter had, substantially, though not in terms, complied with; see too *Nash* v. *Armstrong*, 7 Jur. N. S. 1060; Sug. 164, 165.

agreement is no defence at Law. For example, where there was a written contract for the sale of goods, to be delivered within a specified period, and there was a subsequent parol extension of the time for delivery, it was held that the subsequent parol agreement could not operate either as a rescission of the written contract, or as creating a new contract; and that the seller might revert to his original position, and sue on the written contract (*y*). But even at Law a distinction has been drawn between an alteration of the contract by enlarging the time, and a mere dispensation of its performance at the time stipulated (*z*); and it is not clear that a parol waiver would not be admissible as a defence under the Judicature Act.

defence at Law, where the agreement was in writing.

Where a right of action has actually arisen, this can be discharged only by a release under seal, or by the acceptance of something by way of satisfaction (*a*). Where the contract is under seal, there can be no parol discharge before breach (*b*).

Or release; or satisfaction.

So the defendant, admitting the agreement and its breach, may show that the plaintiff has executed a release under seal; or has accepted something in satisfaction of the breach (*c*); or has already recovered damages in an action upon the agreement (*d*); or that the action has not been brought within the time allowed by the Statutes of Limitation.

Or the impossibility of performing it.

So, on the principle of the maxim *lex non cogit ad impossibilia*, where a lessor covenanted that neither he nor his assigns would during the term, permit any building to be erected on land fronting the demised property, and this land was under the compulsory provisions of a subsequent Act taken by a railway company who erected a station thereon, the covenantor was held to be discharged by the Act from his obligations under the covenant (*e*).

(*y*) *Noble* v. *Ward*, L. R. 1 Ex. 117; affirmed, L. R. 2 Ex. 135.

(*z*) *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; affirmed L. R. 3 Q. B. 272.

(*a*) *Willoughby* v. *Backhouse*, 2 B. & Cr. 821, 824; see *Baylis* v. *Usher*, 4 Moo. & P. 791.

(*b*) See *Spence* v. *Healey*, 8 Exch. 668; *Berwick-on-Tweed, Mayor of*, v. *Oswald*, 1 El. & B. 295.

(*c*) *Willoughby* v. *Backhouse*, 2 B. & C. 821, 824; *Baylis* v. *Usher*, 4 Moo. & P. 791.

(*d*) See 10 Bing. 538.

(*e*) *Bailey* v. *De Crespigny*, L. R. 4 Q. B. 181.

Chap. XVII. Section 7.

(7.) *Action, when restrained in Equity.*

Action, when restrained in Equity.

It has hitherto been the practice in Equity to restrain an action at Law which is inconsistent with a prior decree between the parties in a suit for specific performance (*f*); or an action by a vendor whose bill for specific performance has been dismissed for want of title (*g*): but, in general, the dismissal of the vendor's bill has not interfered with his right to bring an action (*h*); nor has it been considered necessary, although not unusual, to state in the decree that the dismissal was without prejudice to the legal right (*i*). So, a plaintiff proceeding at Law and in Equity for the same subject-matter, has been required in Equity to elect between his remedies (*k*): and, if he have obtained a decree in Equity, has been restrained from proceeding at Law: and the circumstance of the defendant having unsuccessfully pleaded the decree as an equitable defence at Law has not precluded him from coming into Equity for an injunction (*l*); and, as we have seen (*m*), a Court of Equity might, pending a suit by the vendor for specific performance, restrain a purchaser from bringing an action for the deposit (*n*); but would seldom do so, except on the terms of the money being paid into Court (*o*).

Where the question depends on a legal or equitable title.

Where the question has depended partly on a legal title the Court has generally required the plaintiff in Equity to give judgment at Law to be dealt with as the Court shall direct; or, where this cannot be done, has allowed the action to proceed, but has restrained execution on the judgment until the question in the suit has been determined (*p*). Where the question has been purely equitable the Court would grant an injunction at any stage of the action; but

(*f*) *Reynolds* v. *Nelson*, 6 Madd. 290.

(*g*) *M'Namara* v. *Arthur*, 2 Ba. & B. 353.

(*h*) Sug. pp. 235, 236.

(*i*) See 2 Ba. & B. 353.

(*k*) *Infra*, p. 993.

(*l*) *Prothero* v. *Phelps*, 25 L. J. Ch. 105.

(*m*) *Vide suprà*, p. 949.

(*n*) *Kell* v. *Nokes*, 11 W. R. 978; but see *Tanner* v. *Smith*, 4 Jur. 310, Chan.

(*o*) *Tanner* v. *Smith*, *ubi suprà*; *Annesley* v. *Muggridge*, 1 Madd. 593.

(*p*) Seton, 875.

has long been reluctant to interfere in cases where the application has been delayed until the eve of trial at Law (q); and, if a verdict has been obtained, the Court has in general only stayed execution on the judgment in cases of positive fraud, or where the plaintiff at Law has acquired an unconscientious advantage (r).

Injunction, when dissolved.

An injunction obtained against a purchaser, suing on the ground of want of title, was not under the former practice dissolved until the Master had reported on the title (s); and under the present practice will not be dissolved until the chief clerk's certificate of sale has become absolute (t).

Effect of the Judicature Act, 1873.

By the 36 & 37 Vict. c. 66 (u), which will shortly come into operation, no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal is to be restrained by prohibition or injunction; but every matter of Equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if the Act had not passed, either unconditionally or on any terms and conditions, may be relied on by way of defence thereto. Full powers are reserved to the Court of directing a stay of proceedings in any pending cause or matter; and an order for this purpose may in appropriate cases be obtained by motion in a summary way.

(8.) *General matters relating to the action.*

Section 8.

General matters relating to the action.

Particulars of claim.

In an action by the purchaser for non-performance of the agreement, the vendor can require to be furnished with a particular of all matters of fact (but not of law), which the plaintiff means to rely on as constituting non-performance (x): but, if this be not obtained, the latter may

(q) *Lloyd* v. *Adams*, 4 K. & Jo. 467; Seton, 877.

(r) See Seton, p. 877, and cases there cited.

(s) *Church* v. *Legeyt*, 1 Pri. 301.

(t) *Vide infra*, Ch. XXI., sect. 3.

(u) Sect. 24, sub-sect. 5.

(x) See *Collett* v. *Thompson*, 3 Bos. & P. 246; *Roberts* v. *Rowlands*, 3 M. & W. 543; but not particulars of special damage alleged to be incurred, *Retallick* v. *Hawkes*, 1 M. & W. 573; and see *Hodges* v. *Lord Lichfield*, 9 Bin. 713. As to the statement of

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prove any matter amounting to a breach of the agreement; and is not restricted by statements which he may previously have made to the vendor (*y*).

Time, essential at Law;

At Law, time has hitherto been treated as of the essence of the contract (*z*); so that the delay of a single day after the time fixed for the delivery of the abstract, or deducing and verifying a marketable title, or in giving possession at the time specified (*a*) has given to the purchaser an immediate right of action: nor can time, at Law, be varied or enlarged by word of mouth (*b*): and where a time is fixed for completion, and the vendor fails to deduce (*c*), and verify a marketable title before that time, or if, no time being fixed for completion, he deduces a defective title (*d*), and the contract is rescinded while the title remains defective, his having a good title at the time of trial has not been considered a defence to the action (*e*): but if *no* time has been fixed for completion, the vendor has been held entitled to "a reasonable time" for making out his title (*f*): and if, in such case, the purchaser has not applied for the title before bringing an action, it has been considered sufficient if the vendor could make a good title at the time of trial; his having had a defective title, at the date of the contract being treated as immaterial (*g*). But these points have been rendered of little importance by the Judicature Act, 1873, which provides (*h*) that stipulations in contracts as to time

but rule varied by Judicature Act, 1873.

claim which a plaintiff can be required to furnish under the Judicature Act, 1873, see the 18th rule of procedure in the schedule to the Act, and Rules of Court, order 18, rule 5.

(*y*) *Squire* v. *Tod*, 1 Camp. 293; Sug. 238; but see *Todd* v. *Hoggart*, 1 Moo. & M. 222.

(*z*) *Suprà*, p. 417.

(*a*) See *Gedye* v. *Duke of Montrose*, 26 Beav. 45; where the purchaser was held entitled in Equity to compensation for the delay. As to mere forbearance to insist on punctual performance, not being an enlargement of the time, *vide suprà*, p. 971; *Ogle* v. *Earl Vane*, L. R. 2 Q. B. 275; L. R. 3 Q. B. 272; and see *Nash* v. *Armstrong*, 7 Jur. N. S. 1060.

(*b*) *Marshall* v. *Lynn*, 6 M. & W. 109; *Stead* v. *Dawber*, 10 Ad. & E. 57; and *vide suprà*, p. 425.

(*c*) *Seaward* v. *Willock*, 5 East, 198, 202.

(*d*) As to what amounts to defect in title, *vide supra*, p. 281 *et seq.*

(*e*) See *Dobell* v. *Hutchinson*, 3 Ad. & E. 355; *Bartlett* v. *Tuckin*, 6 Taunt. 259; *Roper* v. *Coombes*, 6 B. & Cr. 534; *Seaward* v. *Willock*, 5 East. 198

(*f*) *Sansom* v. *Rhodes*, 8 Sc. 544.

(*g*) *Thomson* v. *Miles*, 1 Esp. 184.

(*h*) 36 & 37 Vict. c. 66, s. 25, subsect. 7.

or otherwise, which would not before the passing of the Act have become of the essence of such contracts in a Court of Equity, are to receive in all Courts the same construction and effect as they would formerly have received in a Court of Equity.

Equitable objections to title a defence at Law.

We may here remark, that a Court of Law may, under its general jurisdiction, consider equitable, as well as legal, objections to the title (*i*). In one case (*k*) where a purchaser brought an action to recover his deposit and expenses, it was held that the Court ought not to consider whether the title was of a doubtful description, such as a Court of Equity would not compel an unwilling purchaser to accept; but simply whether the vendor had made out a good title or not. In a later case of *Jeakes* v. *White*, where the former case does not appear to have been cited, a majority of the Court of Exchequer held that a title which, in Equity, would be considered too doubtful to be forced on a purchaser, was bad also at Law (*l*): so, in a still more recent case, where the title was defective on equitable grounds, which were determined by a Court of Law, the purchaser was held entitled to rescind and to have his deposit returned (*m*). Where, however, the vendor's suit for specific performance had been dismissed without costs, and the purchaser brought an action to recover his deposit and expenses, the Court of Common Pleas abstained from deciding the case on the ground that a Court of Equity had held the title to be unmarketable; and without expressing any opinion as to whether the test applied in *Jeakes* v. *White* ought to be adopted in every case, rested their decision on the ground that the title, being dependent on a question of fact, which it was impossible to regard as reasonably certain, ought not to be deemed sufficient

(*i*) See *Neaves* v. *Burrage*, 14 Q. B. 504; *Forster* v. *Hoggart*, 15 Q. B. 159; *Elliot* v. *Edwards*, 3 Bos. & P. 181, 183; Sug. 400; *Simms* v. *Marryatt*, 20 L. J. 459, Q. B.; 17 Q. B. 281.

(*k*) *Boyman* v. *Gutch*, 7 Bing. 379; 5 Moo. & P. 222.

(*l*) *Jeakes* v. *White*, 6 Exch. 873; Martin, B., *dissentiente*.

(*m*) *Stevens* v. *Austin*, 7 Jur. N. S. 873.

as between vendor and purchaser (n). The result of this decision seems to be that where the title depends on a question of law, it is open to a Court of Law, in a purchaser's action for the recovery of his deposit, to pronounce in favour of the title; although in Equity it may have been considered too doubtful to be forced upon the purchaser.

We may remark that the opinions of conveyancers are, of course, not conclusive against the title (o).

Pleading equitable defences at Law.

The Common Law Procedure Act, 1854 (p), authorized the pleading of equitable defences. The aim of this enactment was to abolish the necessity of applications in Equity to stay proceedings at Law, and so far as mere jurisdiction was concerned, the statutory provisions were amply sufficient for the purpose. A Court of Equity, however, does not merely entertain equitable defences; by the form and working out of its decree, it nicely adjusts, according to their respective merits, the equities of the different parties to the suit. Courts of Law never possessed the same machinery; and, for want of it, could not usefully exercise their new jurisdiction, which practically became restricted in its exercise to cases where a Court of Equity would clearly grant a perpetual and unconditional injunction (q).

Has not ousted the jurisdiction of Courts of Equity.

It is scarcely necessary to remark that the power of adjudicating at Law on equitable defences did not oust the concurrent jurisdiction of the Court of Chancery (r); but the fact that a party had relied on an equitable defence

(n) *Simmons* v. *Heseltine*, 5 Jur. N. S. 270; 5 C. B. N. S. 554.

(o) *Camfield* v. *Gilbert*, 4 Esp. 224.

(p) 17 & 18 Vict. c. 125, s. 83.

(q) See Broom on C. L. 212; *Phelps* v. *Prothero*, 16 C. B. 370; *S. C.* in Equity, 7 De G. M. & G. 722; and see *Gorsuch* v. *Cree*, 6 Jur. N. S. 1342; *Mines Royal Society* v. *Magnay*, 10 Exch. 489; *Davis* v. *Nisbett*, 10 C. B. N. S. 752; and see *Neave* v. *Avery*, 1 Jur. N. S. 575; 16 C. B. 328; where it was held that an equitable defence was not available in ejectment.

(r) *Magnay* v. *Mines Royal Society*, 3 Drew. 130; *Gompertz* v. *Pooley*, 4 Drew. 448; *Stewart* v. *G. W. R. Co.*, 2 Dr. & Sm. 438; affirmed, 2 De G. Jo. & S. 319; and see cases there cited.

at Law might, it seems, be held to operate as a waiver of his right to proceed in Equity (s).

Under the Judicature Act, 1873 (t), in every civil cause or matter commenced in the High Court of Justice, Law and Equity, are to be administered by the High Court of Justice and the Court of Appeal, according to rules, which in effect make it imperative on the Courts to grant to a plaintiff claiming an equitable estate or right, or relief upon any equitable ground, or relief founded on a legal right and hitherto only obtainable in a Court of Equity, the same relief as ought to have been granted by the Court of Chancery in a suit properly instituted for the purpose before the passing of the Act; and also to allow to a defence, on equitable grounds, the same effect as the Court of Chancery ought to have given to it, if relied on, by way of defence in such a suit.

(9) *Remedy by Mandamus against Railway Companies, &c.* Section 9.

Remedy by mandamus against railway companies, &c.

Mandamus to complete granted against company which has given notice to take land;

When a railway or other land-taking company have, under their compulsory powers, entered into a valid statutory contract to take lands, the Court of Queen's Bench, will, if necessary, enforce by mandamus the completion of the purchase. For instance, if before the expiration of the period (u) limited for the exercise of their compulsory powers, they have served the usual notice on the landowner, and then fail to proceed, he may thus summarily compel an assessment of value by jury; and this even after the expiration of the limited period; at least if he have, within that period, served them with notice of his desire to have the price ascertained by a jury (x): and

(s) *Terrell* v. *Higgs*, 4 Jur. N. S. 41; 1 De G. & Jo. 38; *Stewart* v. *G. W. R. Co.*, *ubi suprà.*

(t) 36 & 37 Vict. c. 66, sect. 24.

(u) *Viz.*, three years, unless a different period is specified in the special Act. See L. C. C. Act, s. 123.

(x) See *Reg.* v. *Birmingham and Oxford Junction R. Co.*, 15 Q. B. 634, 646; affirmed in Exch. Ch. *ib.* 647; and see *Pinchin* v. *London & Blackwall R. Co.*, 5 De G. M. & G. 851, 864. And see *Reg.* v. *Irish S. W. R. Co.*, 13 Ir. L. R. 119. It has been

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an action for mandamus will lie, even though no actual damage may have been sustained (*y*).

or has not entered into an agreement with the landowner;

As we have already seen (*z*), the service of a notice to treat by a railway company, though not of itself constituting a contract (*a*), creates a quasi-relation of vendor and purchaser, which is binding on both parties (*b*); but the notice, if not acted on by the company within a reasonable period, may be treated as abandoned (*c*). Until the terms have been agreed upon between the landowner and the company, or the price has been fixed by arbitration, there is no contract which is capable of being enforced in Equity (*d*); and in such a case the proper remedy of the landowner is by mandamus to compel the company to proceed with the other steps directed by their Act. So soon, however, as the price is ascertained the agreement is complete, and if broken, the ordinary remedies for a breach are available (*e*).

or where the price is to be settled by arbitration;

If, after the usual notice by the company, the landowner desire the price to be settled by arbitration, and the reference prove abortive, owing to the non-appointment of an umpire, the landowner may, after the time has expired within which the Board of Trade can make an appointment, apply for a mandamus to compel an assessment by jury (*f*). So, where the price is to be settled by arbitration, a

held that a company cannot under the L. C. C. Act, s. 7, buy up a lessee's interest without also purchasing the estate of the reversioner; *Legg* v. *Belfast, &c., R. Co.*, 13 Ir. L. R. 124, n.; *Reg.* v. *London & N. W. R. Co.*, 18 Jur. 993; 3 E. & B. 443. Costs refused where the sum assessed by the jury was less than the price previously offered by the company; *Reg.* v. *Waterford and Limerick R. Co.*, 13 Ir. L. R. 272. See now as to the appointment of surveyor under the 85th section of the L. C. C. Act, 30 & 31 Vict. c. 127, s. 36, and *vide suprà*, p. 625.

(*y*) *Fotherby* v. *Metrop. R. Co.*, L.R. 2 C. P. 188.

(*z*) *Vide suprà*; pp. 210, 214.

(*a*) See and consider *Haynes* v. *Haynes*, 1 Drew. & Sm. 426.

(*b*) See *Marquis of Salisbury* v. *G. N. R. Co.*, 3 El. & B. 443.

(*c*) *Richmond* v. *North London R. Co.*, L. R. 5 Eq. 352.

(*d*) See *Haynes* v. *Haynes*, *ubi suprà*; *Re Arnold*, 32 Beav. 591, and *vide suprà*, p. 210; Sug. 79, 80.

(*e*) *Harding* v. *Metrop. R. Co.*, L. R. 7 Ch. Ap. 154.

(*f*) *In re The South Yorkshire, &c., R. Co.*, 14 Jur. 1093.

mandamus will be granted to compel the company, at their own expense, to take up the award (*g*).

or where the company has entered on land under Lands Clauses Consolidation Act.

So where a company, not being a railway company (*h*), within the limited period, enter upon land under the 85th section of the Lands Clauses Consolidation Act, making the deposit and giving the bond required by that section, and retain possession until after the expiration of that period, the landowner may, and it rests with him to, take steps to have the amount of compensation settled under the 68th section: he is to state what sum he claims; and if the company within twenty-one days enter into a written agreement to pay that sum, the question of compensation is settled; but if they dispute the amount, it is then to be settled by arbitration; or, if the owner give notice of his wish to have a jury, then by a jury, which the company are required to summon within twenty-one days, and in default thereof are liable to pay the sum claimed (*i*); or he may sue them upon the bond. We may remark that a bond conditioned for payment "at any time hereafter," is not a proper bond within the Act (*k*).

In the case of a railway company entering upon land under the 85th section, the surveyor must now be appointed by the Board of Trade and not by two justices, and the company are to give not less than seven days' notice of their intention to apply to the Board for his appointment; the valuation is to include compensation for all damage, so far as it can be estimated, to be sustained by the exercise of the statutory powers; and the sureties to the bond are to be approved by the Board of Trade, after hearing the parties instead of by two justices (*l*).

Mandamus to complete line and

And even where there has been neither notice given nor entry made, the Court, in cases where the *duty* of constructing

(*g*) *Reg.* v. *S. Devon R. Co.*, 15 Jur. 464.

(*h*) As to which see next paragraph.

(*i*) See *Doe* v. *N. Staff. R. Co.*, 15 Jur. 944; 16 Q. B. 249; *Barker* v. *N. L. R. Co.*, 2 De G. & S. 55.

(*k*) *Cotter* v. *Metrop. R. Co.*, 10 Jur. N. S. 1014.

(*l*) 30 & 31 Vict. c. 127, s. 36.

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make necessary purchases.

the line is imposed upon the company, will, upon the application of a landowner over whose land the line is to be made (*m*), although he be a shareholder (*n*), compel the company to proceed to complete their railway, and to purchase the necessary land for the purpose (*o*): and the near expiration of the time limited for the compulsory purchase of land, is no answer to the application, unless it be shown that there is not time to take the necessary steps to entitle the company to the requisite land (*p*): nor is it sufficient to show that the company have no funds in hand (*q*). But the application will be refused if the company show their actual inability to construct the line (*r*); and it has been decided that the words commonly inserted in the special Acts "it shall be lawful, &c.," are merely permissive and not obligatory (*s*). And the Court will not thus interfere against commissioners under a public Act (*t*).

Action of mandamus.

The Common Law Procedure Act, 1854 (*u*), introduced a novelty in the shape of an action for a mandamus "to fulfil any duty in the fulfilment of which the plaintiff is personally interested;" but this new mode of procedure, which has seldom been resorted to, has been held to apply, not to the enforcement of a duty arising out of a personal contract, as, *e. g.*, an agreement to grant a lease, but only to cases where a writ of mandamus might previously have been obtained. In such cases the Statute has facilitated the remedy; and has also extended to the other superior Courts of Law a jurisdiction which had exclusively belonged to the Court of Queen's Bench (*x*).

(*m*) *Reg.* v. *York. N. & B. R. Co.*, 20 L. J. 503.

(*n*) *Reg.* v. *Ambergate, &c., R. Co.*, 15 Jur. 993.

(*o*) *Reg.* v. *York. N. & B. R. Co.*, 20 L. J. 503.

(*p*) *Reg.* v. *York. N. & B. R. Co.*, 20 L. J. 503.

(*q*) *Reg.* v. *Lancashire and Yorkshire R. Co.*, 20 L. J. 507.

(*r*) See *Reg.* v. *Great Western R. Co.*, 1 El. & B., 774; *Great Western R. Co.* v. *Reg.*, 1 El. & B. 874.

(*s*) *York. & N. M. R. Co.*, v. *Reg.*, 1 El. & B. 858; and see *Edinburgh, Perth & Dundee R. Co.* v. *Philip*, 3 Jur. N. S., 249.

(*t*) *Reg.* v. *Commissioners of Woods and Forests*, 15 Q. B. 761.

(*u*) 17 & 18 Vict. c. 125, s. 68.

(*x*) *Benson* v. *Paull*, 2 Jur. N. S. 425; 6 E. & B. 273; see, too, *Wodehouse* v. *Farebrother*, 5 E. & B. 277; *Wood* v. *Copper Miners Co.*, 17 C. B. 561; *Clerk* v. *Lawrie*, 1 Hurl. & N. 452.

CHAPTER XVIII.

AS TO SPECIFIC PERFORMANCE.

1. *Matters relating to the jurisdiction generally.*
2. *By whom specific performance may be enforced.*
3. *Against whom it may be enforced.*
4. *As to the parties to the suit.*
5. *As to the bill, or statement of complaint.*
6. *As to the former mode of proceeding by claim under the Orders of April,* 1850, *and as to special cases under* 13 *&* 14 *Vict. c.* 85.
7. *As to how the plaintiff's case may be sustained in the absence of a written agreement—fraud—part-performance—admission by defendant of parol agreement—parol variation of written agreements.*
8. *As to grounds of defence negativing plaintiff's right to specific performance except with a variation of the original agreement; viz., fraud—mistake—surprise—misrepresentation—unfulfilled promise—parol variation, &c.*
9. *As to grounds of defence negativing* in toto *plaintiff's right to specific performance; viz., personal incapacity—nature of contract, of fraud, &c., &c., attending its execution—matters relating to the estate—title—or consideration—plaintiff's conduct, &c., after contract—election of other remedy.*
10. *As to the proceedings in the suit; viz., payment of purchase-money into Court—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing bill.*
11. *As to costs.*

(1.) **The primary (and, until recently, the only) relief to be obtained in Equity for the non-performance of the contract, is a decree for specific performance. At one time there was** **Section 1. Specific performance,**

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the primary remedy in Equity.

a floating idea in the profession that the Court might, under its general jurisdiction, award compensation for non-performance, in the event of the primary relief failing. Possibly, the power of granting such subsidiary relief may be inherent in the Court (*a*), but if so, the whole current of modern authorities is against its exercise (*b*); nor, in cases prior to Lord Cairns' Act, did it make any difference that compensation was sought not against the owner of the estate, but against a person who falsely assumed authority to sell (*c*): nor, except under any special circumstances, would a prayer in the alternative for the return of the deposit prevent the dismissal of the bill (*d*).

As to damages under Lord Cairns' Act.

Now under Lord Cairns' Act (*e*), whenever the Court has jurisdiction to entertain a suit for specific performance, it may, in its discretion, award damages to the party injured, either in addition to, or substitution for, the primary relief; such damages to be assessed as the Court shall direct. But this enactment, which has been held to be merely prospective (*f*), has not enlarged the jurisdiction of the Court, so as to enable a plaintiff to sue in Equity, as at Law, merely for damages for breach of contract. Except, therefore in cases where before the Act the Court had jurisdiction to entertain a suit for specific performance, it will not award damages (*g*). The test to be applied in each case is whether, at the date of the filing of the bill, the plaintiff had or had not a good title to the primary equitable relief (*h*). If he had, then it is immaterial that, in the interval before the hearing of the suit, the contract has become incapable of specific per-

(*a*) See *Nelson* v. *Bridges*, 2 Beav. 239; and Sug. 233.

(*b*) *Todd* v. *Gee*, 17 Ves. 273; *Sainsbury* v. *Jones*, 5 Myl. & Cr. 1, see p. 3; *Williams* v. *Higden*, 1 C. P. C. 500.

(*c*) *Sainsbury* v. *Jones*, 5 Myl. & Cr. 1.

(*d*) *Kendall* v. *Beckett*, 2 Russ. & M. 90, 91.

(*e*) 21 & 22 Vict. c. 27, sect. 2. See as to damages in suits for injunction, *suprà*, p. 770.

(*f*) *Wicks* v. *Hunt*, Johns. 380.

(*g*) *Rogers* v. *Challis*, 6 Jur. N. S. 334; 27 Beav. 175; *Chinnock* v. *Sainsbury*, 6 Jur. N. S. 1318; and see *Hindley* v. *Emery*, L. R. 1 Eq. 52; *Middleton* v. *Magnay*, 2 H. & M. 233, 236; *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270; *Scott* v. *Rayment*, L. R. 7 Eq. 112.

(*h*) See *Ferguson* v. *Wilson*, L. R. 2 Ch. Ap. 77, 88, 91.

formance; as, *e. g.*, where a lease, or patent (*i*), the subject-matter of the contract, has expired. If, on the other hand, the plaintiff, at the time of filing his bill, had no equity to have the contract enforced—as where its subject-matter is such that the decree of the Court would not operate upon it—the Act has no application (*k*).

The exercise of the jurisdiction purely discretionary.

It is always matter of discretion with the Court, whether it will award damages under the Act, or leave the plaintiff to recover them at Law (*l*): but there is a growing disinclination to remit a plaintiff to his legal remedies if adequate relief can be given in Equity; and, in appropriate cases falling within the Statute, damages will be awarded, even though not specially asked for by the bill (*m*); but not after a decree for specific performance has been made, unless a supplemental bill is filed for the purpose (*n*). An inquiry, however, will not be directed where no special injury is alleged and proved (*o*); or where the injury is too trivial to evoke the interference of the Court (*p*). In such cases the dismissal of the bill is without prejudice to the plaintiff's right to bring an action (*q*). Even where the Court has power to grant the primary equitable relief, it will not always restrain the plaintiff from suing at Law for damages, if the action and suit, though arising out of the same transaction, are for different objects; as *e.g.*, where B. failed to perform his

(*i*) See *Davenport* v. *Rylands*, L. R. 1 Eq. 302; case of injunction to stay infringement of patent.

(*k*) See Lord Cairns' judgment in *Ferguson* v. *Wilson*, *ubi suprà*; and see *Soames* v. *Edge*, John. 669; *Norris* v. *Jackson*, 1 J. & H. 319; *Darbey* v. *Whittaker*, 4 Drew, 134; *Crampton* v. *Varna R. Co.*, L. R. 7 Ch. Ap. 562, where the plaintiff had a mere money demand which he sought to enforce under cover of a suit for specific performance.

(*l*) *Durell* v. *Pritchard*, L. R. 1 Ch. Ap. 244; *Lady Stanley of Alderley* v. *Earl of Shrewsbury*, L. R. 19 Eq. 616.

(*m*) *Catton* v. *Wyld*, 32 Beav. 266; see *Curriers' Co.* v. *Corbett*, 2 Dr. & Sm. 355; *Lady Stanley of Alderley* v. *Earl of Shrewsbury*, *ubi suprà*.

(*n*) *Corporation of Hythe* v. *East*, L. R. 1 Eq. 620.

(*o*) *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 220; reversed on other grounds, 11 Jur. N. S. 329; *Middleton* v. *Magnay*, 2 H. & M. 233.

(*p*) *Clarke* v. *Clarke*, L. R. 1 Ch. Ap. 16.

(*q*) *Robson* v. *Whittingham*, L. R. 1 Ch. Ap. 442; and see *Clarke* v. *Clarke*, *ubi suprà*.

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contract with A., it was held that A., pending a suit for the cancellation of the bills of exchange which formed the consideration for the contract and for an injunction, might also sue at Law for damages for breach of the contract, which could not have been specifically enforced (r). The right to damages may be forfeited by the plaintiff's own laches (s).

How the damages are assessed.

The amount of damages may be assessed by the Court itself either with or without a jury, or by a Court of Common Law at Nisi Prius or at the Assizes, or before the Sheriff, or (as was the usual practice in suits for specific performance) may be ascertained by an inquiry in Chambers (t). Where the damages are to be assessed before the Court itself, or to be ascertained in Chambers, the defendant may, on taking out a summons for the purpose, pay a sum into Court in respect of the damages; and if the sum paid in exceeds the damages awarded, the plaintiff, as a general rule, must pay the costs of the trial on inquiry (u).

Whether equitable jurisdiction as to damages enlarged under the new procedure.

The equitable jurisdiction to award relief by way of damages is, apparently, not enlarged by the Judicature Act, 1873 (x); but the probable result of the working of the Act will be that in all actions for specific performance, where the plaintiff fails to make out a case for the primary relief, the Chancery division of the High Court will award him such damages as he would be entitled to recover in an action for breach of contract; and that in granting this secondary relief, mere technicalities in the form of the proceeding will be disregarded.

Only awarded when a suit for specific performance would lie.

The statutory remedy by way of damages being merely subsidiary to the primary equitable relief, it is only necessary to consider in what cases a suit for specific performance will lie. The jurisdiction, we may premise, is purely equitable.

(r) *Anglo-Danubian Co. v. Rogerson*, L. R. 4 Eq. 3.

(s) *Lancaster v. De Trafford*, 8 Jur. N. S. 873; *Collins v. Stutley*, 7 W. R. 710.

(t) See 21 & 22 Vict. c. 27, ss. 3, 4.

(u) See Ord. XLI., 40.

(x) 36 & 37 Vict. c. 66.

Thus, the Court of Review (or now the Court of Bankruptcy) cannot enforce specific performance against a purchaser who has not expressly submitted himself to the jurisdiction (y): nor, perhaps, even against one who is willing so to submit himself (z).

Inadequacy of damages, principle on which specific performance decreed.

The principle by which Courts of Equity have professed to be guided in decreeing specific performance of a contract for purchase, is, that damages at Law may not, in the particular case, afford a complete remedy (a): they will, therefore, decline to interfere if the subject-matter of the contract be such that both vendor and purchaser would be reimbursed by damages; as on an ordinary (b) agreement for the sale of stock (c). In the case of land, the purchaser's right to sue can seldom if ever be questioned upon this ground; for the land may, to him, have "a peculiar and special value" (d).

The jurisdiction, however, not confined to contracts for sale of land:

The jurisdiction, however, is not confined to contracts for the sale of an interest in land; for although the Court will seldom interfere in respect of chattels, partly because of their fluctuating value, and partly because damages at Law are a sufficient remedy for a breach of contract, yet, where it is shown that damages are not an adequate compensation, the principle on which the Court decrees specific performance is just as applicable to a contract for the sale of chattels as to a contract for the sale of land. Thus a contract for the sale of articles of unique character, as rare china (e), may be enforced; so too, it is conceived, where the chattels can only be advantageously procured from the person who has

but may extend to chattels;

(y) *Ex parte Cutts*, 3 Dea. 242, overruling *Ex parte Gould*, 1 G. & J. 231; *Ex parte Sidebotham*, 3 D. & C. 818; and *Ex parte Barrington*, 4 D. & C. 461.

(z) See *Ex parte Bennett*, 10 Ves. 382.

(a) See *Adderley* v. *Dixon*, 1 Sim. & St. 610; *Paris C. Co.* v. *Crystal Palace Co.*, 1 Jur. N. S. 720.

(b) As to what special circumstances will affect the general rule, see cases cited *infrà*, p. 986; *Doloret* v. *Rothschild*, 1 Sim. & St. 590; *Pooley* v. *Budd*, 14 Beav. 34.

(c) *Cud* v. *Rutter*, 1 P. Wms. 570; 1 Wh. & T. L. C. 4th edit. 786; *Nutbrown* v. *Thornton*, 10 Ves. 159, 161.

(d) 1 Sim. & St. 610.

(e) *Falcke* v. *Gray*, 4 Drew. 651, 658; and see *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. Wms. 390.

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contracted to sell them. Thus, a contract for the sale of a barge (*f*) has been enforced; so of a patent (*g*); so, of the goodwill of a business, where it is sold in connection with the property (*h*). The Courts of Law now have power to order specific delivery of the chattels or goods sold (*i*); but this has not ousted the jurisdiction of a Court of Equity (*k*).

or railway shares;

So, although an agreement for the transfer of stock will not be enforced (*l*), yet, in the case of shares in a railway or other public company, which are limited in number, and not always to be had in the market (*m*), specific performance may be decreed (*n*); even though nothing has been paid upon them, and there is no pecuniary consideration for the transfer (*o*): and, in one case, where the deed of settlement of a joint-stock company provided that no shareholder should be at liberty to transfer his shares, except in such manner as the board of directors should sanction, specific performance of a contract for the sale of shares was decreed, notwithstanding the refusal of the directors to allow the transfer (*p*); and the fact of a call, of which the purchaser has no notice, having been made at the date of the purchase, does not invalidate the contract (*q*). If the shares are

(*f*) *Charingbould* v. *Curtis*, 21 L. J. Ch. 541.

(*g*) *Coquet* v. *Gibson*, 33 Beav. 557. As to chattels generally, and the distinction between contracts and trusts, see *Pooley* v. *Budd*, 14 Beav. 34; *Pollard* v. *Clayton*, 1 Jur. N. S. 342, V.-C. W.

(*h*) *Darbey* v. *Whittaker*, 4 Drew. 134; and see *Cooper* v. *Hood*, 26 Beav. 293.

(*i*) See the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 78; and the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 2.

(*k*) See *Falcke* v. *Gray*, *ubi suprà*.

(*l*) *Cud* v. *Rutter*, *ubi suprà*; but a contract for the sale of an annuity payable out of the dividends of stock may be enforced. See *Withy* v. *Cottle* 1 Sim. & Stu. 174; 1 Turn. & R. 78.

(*m*) See *Duncuft* v. *Albrecht*, 12 Sim. 189; affirmed, 199.

(*n*) *Shaw* v. *Fisher*, 2 De G. & S. 11; *Wynne* v. *Price*, 3 De G. & S. 310.

(*o*) *Cheale* v. *Kenward*, 3 De G. & Jo. 27.

(*p*) *Poole* v. *Middleton*, 29 Beav. 646.

(*q*) *Hawkins* v. *Maltby*. L. R. 3 Ch. Ap. 188, reversing V.-C. W.; L. R. 4 Eq. 572. See this case as to the right of the original vendor to enforce specific performance against a sub-purchaser, where there has been a series of successive sales and purchases; but in a case in Ireland, *Sheppard* v. *Murphy*, Ir. Rep. 1 Eq. 490, specific performance has been refused in such a case on the ground

bought through a broker, the purchaser takes subject to the established usages of the stock exchange (r).

Where damages would be an inadequate remedy.

Before, however, the Court will decree specific performance of a contract to take shares, it must be conclusively shown that the remedy at Law is inadequate (s).

Where the land is out of the jurisdiction.

The fact of the land, the subject-matter of the contract, being out of the jurisdiction, is no bar to the suit, if the parties are subject to the jurisdiction of the Court (t).

On ground of mutuality of remedy, vendor wanting only purchase-money, may sue in Equity.

A vendor has a mere pecuniary demand against his purchaser who refuses to complete, which may be enforced by an action at Law. If the conveyance has been executed, he may in such an action recover the whole purchase-money; if no conveyance has been executed, he has the land, and may recover the difference between the price agreed upon and the estimated price on a resale; and, in either case, any special damage which he may have sustained by reason of the breach. His case, therefore, is not one in which the relief at Law is inadequate; but upon the principle of affording mutual remedies, the Courts have nevertheless entertained a vendor's bill (u), in every

of want of privity of contract between the vendor and sub-purchaser." See too, *Grissell* v. *Bristowe*, L. R. 3 C. P. 112; *Davis* v. *Haycock*, L. R. 3 Exch. 373; and see now *Merry* v. *Nickalls*, L. R. 7 Ch. App. 733, affirmed by the House of Lords W. N. 1875, p. 67, where it was held that the contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named in the ticket, who are brought together by means of the jobber; and that the latter is not discharged from liability, if he give the name of an infant.

(r) *Stray* v. *Russell*, 5 Jur. N. S. 1295; affirmed, 6 Jur. N. S. [illegible].

(s) *Oriental Inland Steam Co.* v. *Briggs*, 2 J. & H. 625.

(t) *Penn* v. *Lord Baltimore*, 1 Ves. 445; 2 Wh. & T. L. C. 4th edit. 923; *Jackson* v. *Petrie*, 10 Ves. 164; *Cood* v. *Cood*, 33 Beav. 314; 9 Jur. N. S. 1335. As to enforcing claim against the proceeds of sale of land out of the jurisdiction, see *Waterhouse* v. *Stansfield*, 9 Ha. 234; 10 Ha. 254; see also *Paget* v. *Ede*, L. R. 18 Eq. 118, a case of foreclosure of a mortgage of land in an English colony.

(u) *Withy* v. *Cottle*, 1 Sim. & S. 174: *Adderley* v. *Dixon*, *ib.* 607; *Kenny* v. *Wexham*, 6 Madd. 355; *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; see V.-C. Wigram's judgment

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case where the purchaser might sue for specific performance of the contract; and it makes no difference whether the consideration be a life annuity, or a gross sum (*x*); and although the consideration be paid, the right of the vendor to be relieved from liabilities attaching to the ownership will sustain the suit (*y*).

Upon a purchase by a railway company, it is no defence to the landowner's suit, that the price of the land, and the compensation for damage consequential on its purchase, are by the agreement amalgamated in a single sum (*z*).

As to building contracts.

In some of the earlier cases specific performance of contracts to build and execute works has been decreed in Equity; but in one case (*a*), V.-C. Wood considered that the later authorities were entirely opposed to such a practice, and that the proper course in such cases was to direct an inquiry as to damages. Thus, where the agreement was to grant a lease, so soon as the lessee should have built a house of a specified value "according to a plan to be submitted to and approved by the lessor," and which the lessee agreed to do, and to take the lease; specific performance, at the suit of the lessor, was refused (*b*). In a later case, where there was an agreement for a lease, with a stipulation that the lessor should put the house "in substantial and decorative repair," the Court decreed specific performance at the suit

in *Adams* v. *Blackwall R. Co.*, 13 Jur. 621; *Webb* v. *D. P. R. Co.*, 1 De G. M. & G. 528; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575; *Coquet* v. *Gibson*, 33 Beav. 557.

(*x*) *Clifford* v. *Turrell*, *ubi suprà*; affirmed, 9 Jur. 633. As to the small amount of the purchase-money being no bar to the jurisdiction, see *Bennett* v. *Smith*, 16 Jur. 421; *sed quære*, when the suit is by the vendor.

(*y*) See *Shaw* v. *Fisher*, 2 De G. & S. 11; on further directions, 1 Jur. N. S. 971; affirmed, 1055; 5 De G. M. & G. 596; *Cheale* v. *Kenward*, 3 De G. & Jo. 27; *Wynne* v. *Price*, 3 De G. & S. 310; see *Humble* v. *Langston*, 7 M. & W. 517; *Walker* v. *Bartlett*, 17 C. B. 446; affirmed, 2 Jur. N. S. 643.

(*z*) *Webb* v. *Direct London, &c., R. Co.*, 9 Ha. 129, 139: reversed on the general question, 1 De G. M. & G. 521.

(*a*) *Kay* v. *Johnson*, 2 H. & M. 118; see too *Cooper* v. *Jarman*, L. R. 3 Eq. 98.

(*b*) *Brace* v. *Wehnert*, 25 Beav. 348; and see *Norris* v. *Jackson*, 1 J. & H. 319.

of the lessee, with an inquiry whether the repairs had been properly executed; and if not, then an inquiry as to damages (c). Here, however, the Court did not affect to enforce the agreement to repair. In an earlier case, the Court of Appeal held that an agreement to take a lease, if the house were put "into thorough repair," and the drawing-rooms "handsomely decorated according to the present style," could not be enforced at the suit of the lessor: but the decision seems to have rested on the ground that the terms used were too indefinite to be enforced (d).

Distinction where the building or other work is by way of easement or accommodation.

A distinction has, however, been drawn between the case of a contract with a builder to build a house, and the case of a contract for the sale and purchase of land, where some stipulated building or work has to be carried out by either party, by way of easement, or of accommodation for the other. Thus, where A. agreed to sell a piece of land to B., and A. was to make a new road of which B. was to have the user, and B. was to expend £3,000 in building a house upon the land, it was held that there was nothing in the nature of the contract to prevent its being specifically enforced (e). So, where a railway company agreed with a landowner, through whose estate their line would pass, to construct and maintain a siding, with all necessary approaches for public use, the Court decreed specific performance of the contract, so far as it related to the construction of the siding; and a stipulation in the agreement as to the proper maintenance of the work when constructed was held to be no reason for withholding relief (f). So, where a railway company in purchasing land agreed with the vendor that a portion of it should be "for ever thereafter used and employed as and for a first-class station or place

(c) *Samuda* v. *Lawford*, 8 Jur. N. S. 739.

(d) *Taylor* v. *Portington*, 7 De G. M. & G. 328. *Vide infra*, sect. 7.

(e) *Wells* v. *Maxwell*, 32 Beav. 408; affirmed, 9 Jur. N. S. 1021; but the point which we are considering does not appear to have been argued on the appeal.

(f) *Lytton* v. *G. N. R. Co.*, 2 K. & Jo. 394; see, too, *Sanderson* v. *Cockermouth, &c., R. Co.*, 11 Beav. 497; *Greene* v. *West Cheshire R. Co.*, L. R. 13 Eq. 44; *Firth* v. *Midland Railway Company*, L. R. 20 Eq. 100.

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for the purpose of taking up and setting down passengers," the vendor was held entitled to a decree ordering the company to supply the necessary accommodation for a first-class station (to be ascertained at Chambers) (*g*). So, too in a suit for specific performance, a railway company was compelled to construct a drain under their line for the convenience of an adjoining proprietor (*h*). Where, however the agreement by the company was merely to erect a station on part of the lands purchased from the landowner, but there was no stipulation as to the kind of station, or as to the mode of using it, the Court held that the agreement was too indefinite to be specifically enforced, but directed an inquiry as to damages (*i*). The cases we have cited above seem to show that the reason often alleged for the refusal of the Court to interfere in the case of building contracts, *viz.*, that it has no sufficient means of ascertaining whether the work has been properly executed, or the stipulated amount expended thereon (*j*), is not always an operative reason: and it is conceived that when the Judicature Act, 1873 (*k*) comes into operation, this objection, as a ground for withholding relief, will be entitled to even less weight; for the High Court or any Judge thereof will then have power to direct any question or issue of fact, requiring scientific or local investigation to be tried before an official referee appointed under the Act, or before a special referee to be agreed upon between the parties (*l*).

Where the default is on the part of the vendor, the Court may in some cases virtually enforce the contract by allowing the purchaser to execute the work, and to deduct his costs of doing so from his unpaid purchase-money (*m*).

(*g*) *Hood* v. *North-Eastern R. Co.*, L. R. 8 Eq. 666; affirmed, L. R. 5 Ch. Ap. 525.

(*h*) *Powell* v. *G. W. R. Co.*, 1 Jur. N. S. 773.

(*i*) *Wilson* v. *Northampton and Banbury, &c., R. Co.*, L. R. 9 Ch. Ap. 279.

(*j*) See *Brace* v. *Wehnert*, *ubi suprà.*

(*k*) 36 & 37 Vict. c. 66.

(*l*) Sect. 57, and see sects. 56, 58, 59, and 83 Rules of Procedure, r. 30.

(*m*) See and consider *Wells* v. *Maxwell*, 32 Beav. 408; 9 Jur. N. S. 565, 567.

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Where there has been part performance of a contract of this description.

So, part performance of a contract of this description has, in some cases, been held to give the Court a jurisdiction to enforce it, which it would not have had, if the contract had remained wholly incomplete. Thus, where a conveyance contained a covenant by the purchasers with the vendor that they would make a road and erect a market-house, and they entered into possession and made the road, but neglected to build the market-house, V.-C. Wigram observed that the purchasers having had the benefit of the contract *in specie*, the Court would go any length that it could to compel them to perform their obligations under it (*n*). But unless the terms of the contract are sufficiently definite, part performance cannot be relied on as a ground for enforcing it (*o*).

General remarks on the cases.

The result seems to be that, as a general rule, the Court will not entertain a suit for the specific performance of a contract, wholly or principally for the erection of buildings, or the execution of other specified works, by either party; but that, where the contract has been partly performed, and the parties cannot be restored to their original position, or where the execution of the stipulated work is only a subsidiary term of the contract, specific performance may, but will not necessarily, be decreed.

Contract for sale of good-will not enforced, except in what cases;

So too, partly on the ground of the incapacity of the Court to execute the contract, and partly in consequence of the uncertainty of the subject-matter, specific performance of an agreement for the sale of the good-will of a business is refused (*p*); except in cases where the good-will is sold in connection with the property to which it is attached (*q*). But the Court will interfere by injunction to restrain a breach of an agreement not to carry on a similar business

(*n*) *Price* v. *Corporation of Penzance*, 4 Ha. 506; see too *Storer* v. *G. W. R. Co.*, 2 Y. & C. C. C. 48; *Wilson* v. *Furness R. Co.*, L. R. 10 Eq. 28; *Greene* v. *West Cheshire R. Co.*, L. R. 13 Eq. 44.

(*o*) *South Wales R. Co.* v. *Wythes*, 1 K. & Jo. 200, and see judgment; *Wilson* v. *Northampton and Banbury R. Co.* L. R. 9 Ch. Ap. 279.

(*p*) See *Baxter* v. *Conolly*, 1 J. & W. 576; *Coslake* v. *Till*, 1 Russ. 376.

(*q*) See *Darbey* v. *Whittaker*, 4 Drew. 134, 140.

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within specified limits (*r*); which, however, must be reasonable (*s*).

nor a contract to become partners;

So, as a general rule, the Court will not enforce an agreement to become partners (*t*), or to contribute a specified sum towards the partnership capital (*u*); for in such cases its decree would either be altogether nugatory, or incapable of being adequately enforced.

nor a contract for a yearly tenancy.

The Court has refused to enforce, on behalf of a lessor, a contract for a yearly tenancy (*x*); nor will it, except under very special circumstances, enforce an agreement for a lease, when the term has expired by effluxion of time (*y*).

Whether existence of easier remedy by mandamus is a bar.

Whether the mere fact of the defendant being bound under an Act of Parliament to complete the contract, and of the plaintiff having an easier remedy by mandamus, will prevent the latter from enforcing (if he please) his equitable remedy, has been doubted (*z*). In one case (*a*), where a railway company, being authorized and required by their special Act, with the consent of a majority of the proprietors, to purchase a canal, refused to carry out an agreement for the purchase which had been entered into by the projectors of the company, a bill by the vendors for specific performance was dismissed upon the ground that there was no contract under the corporate seal; and V.-C. Wood expressed it as his opinion that where the contract is not under the seal of the company, or signed by two directors, as provided by

(*r*) *Avery* v. *Langford*, Kay, 663.

(*s*) See *Harms* v. *Parsons*, 32 Beav. 328, and cases cited; and see Kerr on Injunctions, 503, *et seq.*

(*t*) See *Sheffield Gas, &c., Co.* v. *Harrison*, 17 Beav. 294; *Scott* v. *Rayment*, L. R. 7 Eq. 112; and see Lindley, 947—949, 2nd edit.

(*u*) *Sichel* v. *Mosenthal*, 30 Beav. 471.

(*x*) *Clayton* v. *Illingworth*, 10 Ha. 451; and see an Article, 3 Jur. N. S. 201.

(*y*) See *Walters* v. *Northern Coal M. Co.*, 2 Jur. N. S. 1; affirmed, 5 De G. M. & G. 629.

(*z*) See *Walker* v. *Eastern Counties R. Co.*, 6 Ha. 594; *Adams* v. *Blackwall R. Co.*, 13 Jur. 620, V.-C. W., reversed on appeal, 2 Mac. & G. 118; 6 Rail. Ca. 271; *Pinchin* v. *L. & B. R. Co.*, 1 K. & J. 68; 5 De G. M. & G. 851; see also *Hyde* v. *Edwards*, 12 Beav. 160, 253; and *King* v. *Rochdale Canal Co.*, 15 Jur. 896, Q. B.; *Leominster Canal Co.* v. *Shrewsbury and Hereford R. Co.*, 3 K. & Jo. 654; *Regent's Canal Co.* v. *Ware*, 23 Beav. 575.

(*a*) *Leominster Canal Co.* v. *Shrewsbury and Hereford R. Co.*, 3 K. & Jo. 654.

the Lands Clauses Consolidation Act, or where any question as to the terms of the agreement is left open, the proper mode of enforcing the obligations imposed upon the company by their special Act is by *mandamus*, and not by bill for specific performance. It is now, as we have seen (*b*), well settled that where the land is taken by the company under their compulsory provisions, mere service of notice to treat, though it entitles the landowner to proceed by *mandamus*, does not of itself constitute an agreement which can be specifically enforced in Equity. Where the company may obtain the same advantage by proceeding under their Act, they will not, even if successful, be allowed their costs of a suit for specific performance (*c*).

Where a railway company takes land by private contract, the jurisdiction of the Court to enforce particular stipulations as to easements, &c., is not ousted by the provisions of the Railway Acts (*d*).

Plaintiff cannot proceed at once at Law and in Equity.

If a plaintiff proceed both at Law and in Equity for the same subject-matter, he may, by order of course (*e*), be compelled to elect between his action and suit (*f*); and it is not clear that a similar rule will not prevail, when Law and Equity are concurrently administered, if a plaintiff attempts at the same time to enforce both his legal and equitable remedies in respect of the same subject-matter. This relief has been afforded where a landlord had filed a bill against his tenant for specific performance of an agreement to take a lease, and was also suing him for use and occupation of the premises during part of the term (*g*): but where the action is brought for the non-performance of particular acts,

(*b*) *Vide suprà*, pp. 210, 978, and cases there cited.

(*c*) *Regent's Canal Co.* v. *Ware*, 23 Beav. 575.

(*d*) *Sanderson* v. *Cockermouth, &c. R. Co.*, 2 H. & Tw. 327; *Lytton* v. *G. N. R. Co.*, 2 K. & Jo. 394.

(*e*) As to the proper mode and time for applying for the order, see Dan. Ch. Pr. p. 757.

(*f*) Dan. Ch. Pr. 756, *et seq.*; *Royle* v. *Wynne*, Cr. & P. 252; *Anon.*, 20 L. T. 60; and see *Faulkner* v. *Llewellyn*, 10 W. R. 506, V.-C. K.; *Gedye* v. *Duke of Montrose*, 26 Beav. 45, 47. As to election between home and colonial litigation, *Anstruther* v. *Arabin*, 6 Moo. P. C. 286.

(*g*) *Ambrose* v. *Nott*, 2 Ha. 649; see *Hole* v. *Pearce*, 5 Ha. 408.

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—*e.g.*, to improve or repair the property,—the performance of which is not specifically prayed by the bill, or which are acts the specific performance of which cannot be decreed, and the action is brought only for such damages as were sustained up to the time of its commencement, no case for election seems to arise (*h*). And where, before Lord Cairns' Act (*i*), a plaintiff in Equity might at the same time have sued for damages at Law, he may still do so, notwithstanding that damages might have been asked for and obtained in the suit (*k*).

Specific performance when decreed, although contract may vest estate in purchaser.

And although the agreement may in itself vest in the purchaser the interest contracted for (*l*), yet, if it appear on its face that a further instrument is necessary to carry out the intentions of the parties, the Court will decree specific performance of the agreement in that particular (*m*). And the Court will decree specific performance of a special stipulation in the agreement, *e.g.*, that the vendor shall give a bond against carrying on a specified trade within certain limits (*n*): that is, if the agreement be one which has been performed, or can be enforced, in all its other material terms (*o*).

The relief is purely discretionary.

Lastly, we may remark that the granting or withholding of relief in suits for specific performance is always a matter of discretion with the Court (*p*)—a discretion, however, which is to be exercised, not arbitrarily, but according to fixed and settled rules; and to be regulated upon grounds which will make it judicial (*q*).

(*h*) See *Fennings* v. *Humphery*, 4 Beav. 1, 7.

(*i*) 21 & 22 Vict. c. 27.

(*k*) See *Anglo-Danubian Co.* v. *Rogerson*, L. R. 4 Eq. 3; and *vide suprà*, p. 983.

(*l*) *Sed vide suprà*, p. 246.

(*m*) *Fenner* v. *Hepburn*, 2 Y. & C. C. C. 159.

(*n*) *Avery* v. *Langford*, Kay, 663; and see *Harms* v. *Parsons*, 32 Beav. 328, as to what are reasonable limits.

(*o*) *South Wales R. Co.* v. *Wythes* Kay & J. 186, affirmed, 5 De. G. M. & G. 880; *Pollard* v. *Clayton*, 1 Kay & J. 462.

(*p*) *Cox* v. *Middleton*, 2 Dre. 209; *Pyrke* v. *Waddingham*, 10 Ha. 1; *Watson* v. *Marston*, 4 De G. M. & G. 230; *Bennett* v. *Smith*, 16 Jur. 422.

(*q*) See *White* v. *Damon*, 7 Ves. 30, 35; *Haywood* v. *Cope*, 25 Beav. 140, 151.

(2.) *By whom specific performance may be enforced.*

Chap. XVIII. Section. 2.

By whom specific performance may be enforced.

Enforced in Equity at suit of purchaser, or his representatives in interest;

Equity will enforce specific performance of the contract for sale at the suit of the purchaser himself, or of his representatives in interest,—such interest, it must be remembered, being the right to take the estate on payment of the purchase-money;—*e.g.*, his alienees by act *inter vivos* (*r*), or assignees or trustee in bankruptcy (*s*), or committees in lunacy (*t*), or, in case of his death, by his real or personal representatives (according to the nature of the estate contracted for).

or of vendor or his representatives in interest.

So, the contract for purchase may be enforced at the suit of the vendor himself, or his representatives in interest;—such interest, it must be remembered, being the right to receive the purchase-money on a conveyance being given of the estate;—*e.g.*, his alienees by act *inter vivos* (*u*), or assignees or trustee in bankruptcy (*x*), or committees in lunacy (*y*), or (in the case of death) by his executors or administrators (*z*): so, if the contract have been entered into by a tenant for life, in due (*a*) exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*b*).

Commissioners of Woods and Forests.

It has been held that the Commissioners of Woods and Forests are neither entitled to sue nor liable to be sued for the specific performance of contracts entered into with or by them (*c*).

(*r*) See *Nelthorpe* v. *Holgate*, 1 Coll. 218.

(*s*) See 6 Geo. IV. c. 16, s. 76; 12 & 13 Vict. c. 106, s. 146; 24 & 25 Vict. c. 134, s. 131; 32 & 33 Vict. c. 71, s. 15.

(*t*) See Shelf. on Lun. 546, *et seq.*

(*u*) See Calv. on Par., 2nd ed., 314; Dan. Ch. Pr. 192.

(*x*) See and consider 12 & 13 Vict. c. 106, ss. 141, 142; 32 & 33 Vict. c. 71.

(*y*) Shelf. on Lun. 564.

(*z*) *Roberts* v. *Marchant*, 1 Ph. 370.

(*a*) But not otherwise, *Ricketts* v. *Bell*, 1 De G. & S. 335.

(*b*) See *Shannon* v. *Bradstreet*, 1 Sch. & L. 52, 65; *Lowe* v. *Swift*, 2 Ba. & B. 529; 2 Sug. Pow., 6th ed., p. 134; 1 De G. & S. 344.

(*c*) *Nurse* v. *Lord Seymour* 13 Beav. 254.

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(3.) *Against whom specific performance may be enforced.*

Specific performance may be enforced against vendor, and parties claiming under him by subsequent title (except without notice);

Equity will enforce specific performance of the contract for sale, against the vendor himself, and also against, first, persons claiming under him by a title arising subsequently to the contract (except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract): *e.g.*, his assignees or trustee in bankruptcy (*d*), or committees in lunacy (*e*), or voluntary alienees (*f*), or judgment creditors (*g*), or the aftertaken wife or husband of the vendor (*h*), or the vendor's alienees for value, (if they purchased with notice of the prior contract (*i*), or have not taken a conveyance (*k*), or (in case of his death) against his real (*l*) or personal representatives (according to the nature of the estate contracted for).

A person who is of right and *de facto* in the possession of a corporeal hereditament, is entitled to impute knowledge of that possession to all who deal for any interest in the property conflicting or inconsistent with the title, or alleged title, under which he is in possession, or which he has a right to connect with his possession of the property: nor can a person who is aware of such possession be heard to deny that he has thereby notice of the title, or alleged title, under which the possession is claimed or enjoyed: nor is it necessary, for the purpose of fixing notice, that the possession

(*d*) *Orlebar* v. *Fletcher*, 1 P. Wms. 737; *Taylor* v. *Wheeler*, 2 Ver. 564; and see 2 Ves. S. 633; *Parker* v. *Smith*, 1 Coll. 608.

(*e*) Shelf. on Lun. 564; 1 Will. IV. c. 65, s. 27.

(*f*) See *Hinton* v. *Hinton*, 2 Ves. S. 631, 633.

(*g*) *Brunton* v. *Neale*, 14 L. J. N. S., L. C. 8.

(*h*) See 2 Ves. S. 633.

(*i*) *Daniels* v. *Davison*, 16 Ves. 249; *S. C.*, 17 Ves. 433; *Lightfoot* v. *Heron*, 3 You. & C. 586; *Cutts* v. *Thodey*, 1 Coll. 223; *Fenster* v. *Turner*, 6 Jur. 144; *Potter* v. *Sanders*, 6 Ha. 1; *Hersey* v. *Giblett*, 18 Beav. 174; *Shaw* v. *Thackray*, 1 Sm. & G. 537; *Barnes* v. *Wood*, L. R. 8 Eq. 424; *Bishop of Winchester* v. *Mid-Hants. R. Co.*, L. R. 5 Eq. 17, where specific performance of a contract with a railway company was enforced against another company, who had leased the line.

(*k*) As to which, *vide suprà*, pp. 829, 832.

(*l*) Although not named, *Gell* v. *Vermedun*, Freem. C. C. 99.

should be continually visible, or without cessation actively asserted, unless there is evidence of intentional abandonment (*m*). Thus, where purchasers of mines entered into possession under an agreement, but took no conveyance, a subsequent purchaser of the land without any exception of the mines, was held to have bought with notice of the agreement, and to be bound specifically to perform it; although there was evidence that mining operations had been suspended prior to the date of his purchase (*n*).

It appears, however, to have been held in *Dawson* v *Ellis* (*o*) that if A. enters into a verbal contract to purchase, he is not bound by a notice of a subsequent written contract for sale to B.; but may, if he can, obtain a conveyance from the vendor in pursuance of the verbal contract: the argument to which the Court seems to have acceded being that although the Statute of Frauds will not allow a parol contract to be actively enforced, it may be used for defensive purposes, to establish a prior equity.

and against parties claiming under a prior title, which he might have displaced by conveyance.

And, secondly, Equity will enforce specific performance of the contract for sale against persons claiming under a title which, although prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor; *e. g.*, voluntary alienees (*p*); wife entitled to freebench (if, as is the case in most manors, her title depends upon her husband dying seised) (*q*); dowress who married since the late Dower Act came into operation (*r*); vendor whose wife, married before the Act, refuses to release her dower, where the purchaser is willing to take the estate with compensation (*s*); joint tenants claiming by survivorship (*t*)

(*m*) *Per* L. J. Knight Bruce in *Holmes* v. *Powell*, 8 De G. M. & G. 572, 580, 581.

(*n*) *Holmes* v. *Powell*, *ubi suprà*.

(*o*) 1 Jac. & W. 524, Sug. 142.

(*p*) *Buckle* v. *Mitchell*, 18 Ves. 100; *Metcalfe* v. *Pulvertoft*, 1 Ves. & B. 180; *Willats* v. *Busby*, 5 Beav. 193; *Stacpoole* v. *Stacpoole*, 4 Dru. & W. 320, 352.

(*q*) *Hinton* v. *Hinton*, 2 Ves. S. 631; *Brown* v. *Raindle*, 3 Ves. 256; freebench is not within the Dower Act, *suprà*, p. 576.

(*r*) 3 & 4 Will. IV., c. 105, ss. 4, 5.

(*s*) *Wilson* v. *Williams*, 3 Jur. N. S. 810; see too *Barnes* v. *Wood*, L. R. 8 Eq. 424.

(*t*) See *Hinton* v. *Hinton*, 2 Ves. S. 631, 634, and cases cited *suprà*,

and remaindermen, or *cestuis que trust*, in cases where the vendor has contracted in due exercise of a power or pursuant to a trust (*u*); subject, nevertheless, to these exceptions, *viz.*, that the contract of a tenant in tail who dies before executing the conveyance, does not affect the interests of the issue in tail or remaindermen (*x*): and that the contract of a trustee will not be enforced if the attendant circumstances constitute it a breach of trust (*y*). In one case, trustees of a turnpike road were compelled to complete a contract which they had entered into, in forgetfulness of a statutory right of pre-emption under the General Turnpike Act (*z*), although the right was insisted on: but in this case the purchaser was willing to take such estate as the vendors could convey (*a*).

Contract by one of several executors.

Where one of two executors entered into a contract for the sale of his testator's leaseholds, in the erroneous belief that he had the authority of his co-executor, it was held, on the ground of the mistake, that the purchaser could not insist on the sale being completed; and the Court of Appeal declined to express any opinion as to whether specific performance of a contract for sale by one executor, apart from his co-executor, can be enforced (*b*).

Voluntary settlor cannot enforce his contract to sell.

A voluntary settlor will not be restrained from selling (*c*); but if he contract to sell he cannot himself enforce specific

p. 278, n. (*t*); and which seem to overrule *Musgrave* v. *Dashwood*, 2 Vern. 45, 63.

(*u*) *Mortlock* v. *Buller*, 10 Ves. 315; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; and see cases cited, *suprà*, p. 955, n. (*b*).

(*x*) 3 & 4 Will. IV., c. 74, s. 47; and see, as to the same being the rule before the Act, *Frank* v. *Mainwaring*, 2 Beav. 115; and see Sug. 467; *Pryce* v. *Bury*, 2 Drew. 11; and compare *Davis* v. *Tollemache*, 2 Jur. N. S. 1181; and see Lord St. Leonards' comments, V. & P. 468.

(*y*) *Mortlock* v. *Buller*, 10 Ves. 292; *White* v. *Cuddon*, 8 Cl. & F. 766; *Shrewsbury, &c., R. Co.* v. *London & N. W. R. Co.*, 4 De G. M. & G. 115; 6 H. L. Ca. 112; *Maw* v. *Topham*, 19 Beav. 576.

(*z*) 3 Geo. IV., c. 126, s. 87.

(*a*) *Barrett* v. *Ring*, 2 Sm. & G. 43; *sed quære.*

(*b*) *Sneesby* v. *Thorne*, 1 Jur. N. S. 536, V.-C. W.; affirmed, *ib.* 1058; 7 De G. M. & G. 399; and see *Tarratt* v. *Lloyd*, 2 Jur. N. S. 371.

(*c*) *Pulvertoft* v. *Pulvertoft*, 18 Ves. 84.

performance (*d*); except, perhaps, against a purchaser who is willing to complete, on a good title being shown (*e*). On the other hand, the purchaser can enforce the contract against the voluntary settlor (*f*); or, if he reject the title, can recover his deposit at Law (*g*). But although the Court will not force the title on the purchaser, and so make him the instrument of avoiding the voluntary settlement (*h*), yet when the deed has been avoided under the 27 Eliz. by a *bonâ fide* sale for value, the title may, but not necessarily will, be forced on a subsequent purchaser. The volunteers have no equity against the purchase-money payable to the settlor (*i*): if brought before the Court by the purchaser, will not be ordered either to pay or to receive costs (*k*).

Contract for sale of married woman's estate, when capable of being enforced.

The contract by a married woman, either with or without her husband's concurrence, for the sale of her real estate not settled to her separate use or appointment (other than her chattels real) (*l*), is incapable of being enforced against her (*m*): and the rule applies where she is a trustee for sale (*n*). Nor will her contract, although signed with the husband's concurrence and in his presence, bind any interest which he may then unknowingly have, or subsequently acquire, in the property (*o*): and it has been held that her contract under seal does not acquire validity by being acknowledged by her under the 3 & 4 Will. 4, c. 74 (*p*); but,

(*d*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, Turn. & R. 281.

(*e*) *Peter* v. *Nicolls*, L. R. 11 Eq. 391, *sed quære*.

(*f*) *Buckle* v. *Mitchell*, and cases cited, *suprà*.

(*g*) *Clarke* v. *Willott*, L. R. 7 Exch. 313.

(*h*) *S. C.*

(*i*) *Daking* v. *Whimper*, 26 Beav. 568.

(*k*) *S. C.*

(*l*) As to which, see next paragraph.

(*m*) *Emery* v. *Wase*, 5 Ves. 848; *Davidson* v. *Gardner*, Sug. p. 206; *Aylett* v. *Ashton*, 1 Myl. & Cr. 105; see *Lassence* v. *Tierney*, 1 Mac. & G. 572; *Field* v. *Moore*, 19 Beav. 176; 7 De G. M. & G. 691; *Nicholl* v. *Jones*, L. R. 3 Eq. 696; *Castle* v. *Wilkinson*, L. R. 5 Ch. A. 534; but see and consider *Barrow* v. *Barrow*, 4 K. & Jo. 409.

(*n*) *Avery* v. *Griffin*, L. R. 6 Eq. 606.

(*o*) *Aylett* v. *Ashton*, 1 Myl. & Cr. 105.

(*p*) *Crofts* v. *Middleton*, 2 K. & J. 194; reversed, 8 De G. M. & G. 192; see judgment of L. J. Knight Bruce.

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on appeal, this decision was reversed. She may, it seems, without deed acknowledged, elect so as to bind her interest in real estate; and, having elected, may be ordered to complete her contract, on the ground that she shall not avail herself of fraud (*q*).

Where she is entitled for her separate use or has power to appoint.

If, having a power of appointment, she enter into a contract executed with the formalities required by the power (*r*); or if, as respects estate settled merely to her separate use with no restraint on anticipation, she enter into such a contract as would bind her if a *feme sole* (*s*), the estate, in either case, is bound, although no decree can be made against her personally (*t*): and even in the case of an agreement in exercise of a power, the want of mere formalities may, it seems, be supplied: *e.g.*, where a married woman, having a power to appoint by deed, enters into a contract not under seal, specific performance may be decreed (*u*); but this, it is conceived, would not be the case where the omission went to the substance of the power, or consisted in the want of formalites which were intended for her protection (*x*). Thus, where a trustee had power to lease at the request in writing of a married woman, and she gave her parol consent to, and executed, a lease, but before the lease was delivered and the counterpart executed, withdrew her consent, it was held that there was no contract binding upon her (*y*).

(*q*) See and consider *Barrow* v. *Barrow*, 4 K. & Jo. 409, and cases there cited; and see *Sharpe* v. *Foy*, L. R. 4 Ch. Ap. 35.

(*r*) See Sug. 206; *Daniel* v. *Adams*, Amb. 498; *Martin* v. *Mitchell*, 2 Jac. & W. 425; *Heather* v. *O'Neill*, 2 De G. & Jo. 417, 418; *Atkinson* v. *Smith*, 4 Jur. N. S. 963; reversed, *ib.* 1160; 3 De G. & Jo. 186; and see Sug. Powers, 8th edit. 280.

(*s*) *Grigby* v. *Cox*, 1 Ves. S. 518; *Wainwright* v. *Hardisty*, 2 Beav. 363; *Stead* v. *Nelson*, 2 Beav. 245; but see *Harris* v. *Mott*, 14 Beav. 169; *quære* the *dictum*, 170; and see *Chester* v. *Platt*, cited Sug. 206. As to the power of a *feme covert* to sue without the intervention of a next friend under the new rules of procedure, on obtaining the leave of the Court, see rule 15 in the Schedule to the Judicature Act, 1873.

(*t*) *Nantes* v. *Corrock*, 9 Ves. 189; *Aylett* v. *Ashton*, 1 Myl. & Cr. 112; *Francis* v. *Wigzell*, 1 Madd. 258.

(*u*) See *Stead* v. *Nelson*, *ubi suprà*; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.

(*x*) See *Lassence* v. *Tierney*, 1 Mac. & G. 551, 572; *Thackwell* v. *Gardiner*, 5 De G. & S. 58, 65; *Hughes* v. *Wells*, 9 Ha. 749; *Hopkins* v. *Myall*, 2 Russ. & M. 86.

(*y*) *Phillips* v. *Edwards*, 33 Beav. 440.

Where her separate estate is subject to a restraint on anticipation, this cannot be waived by the Court, however much such waiver might apparently be for her advantage (z).

A husband may enforce his wife's contract.

A husband may adopt and enforce his wife's contract. Thus, where a married woman, without her husband's knowledge, induced her father to sell her a field, to be paid for out of her private savings, and he, after some reluctance, accepted the money and put the husband into possession, which was retained for ten years without payment either of rent or of interest on the purchase-money, it was held that the husband, who had remained in ignorance of the transaction, was entitled to have the contract specifically performed (a).

Whether wife surviving is barred by husband's contract for sale of her chattels real.

If a husband by act *inter vivos*, as by assignment or underlease, disposes of his wife's chattels real, whether legal or equitable, her right by survivorship will be defeated (b); but it does not appear to be settled (c), whether the husband's mere contract to sell or underlease the term for years, (whether legal or equitable,) of his wife, will bind her surviving. Some early authorities are in favour of the purchaser (d); but, in recent decisions, so strong an inclination has been shown to limit the husband and his alienees to their strict legal rights, that it may be reasonably conjectured that the wife surviving will not be bound (e); except, perhaps, in cases

(z) *Robinson* v. *Wheelwright*, 2 Jur. N. S. 32; 21 Beav. 214; 6 De G. M. & G. 535. See and compare *Sanger* v. *Sanger*, L. R. 17 Eq. 470, a case under the late Act; and *vide suprà*, p. 12.

(a) *Millard* v. *Harvey*, 33 Beav. 237; 10 Jur. N. S. 1167.

(b) See 1 Rop. Husb. & Wife, by Jac. 173; 1 Preston on Abstracts, 344; Williams' Executors, 652. But if he dispose of them by will the wife's right by survivorship will not be defeated, Preston on Abstracts, 343; nor, it would seem, if he mortgage them, reserving the equity of redemption to himself, unless there is something in the form of the deed which rebuts the ordinary presumption that it was intended only as a security; see and consider *Clark* v. *Burgh*, 2 Coll. 221; and see *Pigott* v. *Pigott*, L. R. 4 Eq. 549.

(c) See the query of V.-C. K. Bruce, in *Clark* v. *Burgh*, 2 Coll. 226.

(d) See *Steal* v. *Cragh*, 2 Eq. Ca. Ab. 37, 130; and Lord Eldon's remarks in *Druce* v. *Denison*, 6 Ves. 394; and see Williams on Executors, p. 655.

(e) See *Sturgis* v. *Champneys*, 5 Myl. & C. 97; *Elwyn* v. *Williams*, 7

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where the contract has in substance, though not in form, been completed, as where the purchaser has been let into possession.

The Married Women's Property Act, 1870 (*f*), does not appear to have affected the marital rights of a husband over chattels real belonging to his wife at the date of the marriage, or which she acquires during the coverture, otherwise than under an intestacy: but the 7th Section provides that personal property (which term, it is conceived, includes leaseholds), to which a woman married since the passing of the Act (*g*), becomes entitled during the coverture, shall belong to her for her separate use.

As respects land-tax belonging to wife.

Where a married woman is a proprietor of redeemed land tax, and her husband procures the marriage to be registered at the Land-tax Office, pursuant to the 38 Geo. III. c. 60, s. 78, he thereby acquires an absolute power of disposition over it (*h*): but it is conceived that he could not bind the wife's right by a mere contract: and even if he mortgage the land tax, reserving the equity of redemption to himself, this will not defeat her right by survivorship (*i*).

Whether wife may adopt her husband's contract.

In one case (*k*) a question arose, but was not decided, as to whether the wife surviving may adopt her husband's contract for sale of her real estate.

Vendor's contract cannot be enforced against parties claiming under prior absolute title.

And the vendor's contract will, of course, not be enforced against persons claiming under a prior title which he himself could not have displaced by a conveyance; *e. g.*, a dowress under the old law (*l*), or a wife seised of an estate of inheritance: nor will the contract of a tenant for life be enforced against the trustees of the reversion who are empowered but decline to sell at his request (*m*).

Jur. 337; *Ashby* v. *Ashby*, 1 Coll. 553; *Newenham* v. *Pemberton*, 1 De G. & S. 644; *Whittle* v. *Henning*, 2 Ph. 731.

(*f*) 33 & 34 Vict. c. 93.

(*g*) *i. e.* 9th August, 1870.

(*h*) *Pigott* v. *Pigott*, L. R. 4 Eq. 549.

(*i*) *Ibid.*

(*k*) *Humphreys* v. *Hollis*, Jac. 76.

(*l*) But see *Wilson* v. *Williams*, 3 Jur. N. S. 810, *suprà*, p. 274.

(*m*) *Thomas* v. *Dering*, 1 Ke. 729.

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Purchaser's contract will be enforced against himself and his representatives.

So, the contract for purchase will be enforced against the purchaser himself, his committees in lunacy (*n*), and real and personal representatives. If he become bankrupt, his trustee under the recent Act has (as the assignees under the old law had) the option of abandoning the contract or of completing it, (paying of course, the entire amount due for purchase-money); and the vendor may, by application in writing, compel the trustee to make his election within the time prescribed by the Act (*o*). It is, however, conceived, that if, as might sometimes happen, (*e. g.*, in the case of house property destroyed by fire after the contract,) the vendor were willing to convey the estate and to prove under the bankruptcy for the purchase-money, he would have a right to do so. Where the purchaser, having paid part of the purchase-money, became insolvent, and his assignees, upon a bill being filed against them disclaimed, the Court declared the representatives of the vendor absolutely entitled to the estate (*p*).

Against separate estate of married woman.

A married woman's separate estate may be liable under her contract for purchase (*q*); but the vendor's suit must be directed specifically against such separate estate, and should not seek a decree against her personally (*r*). Whether the same relief would be afforded in the case of her parol contract followed by part performance seems to be somewhat doubtful (*s*).

(*n*) Shelf. on Lun. 564; Sug. 208; and *vide suprà*.

(*o*) See 32 & 33 Vict., c. 71, ss. 23, 24; and as to election under the former law, see 12 & 13 Vict., c. 106, s. 146. *Ex parte Dendy*, 1 Fonb. N. R. 53; and see further as to election and disclaimer, *suprà*, pp. 84, 253.

(*p*) *Gabriel* v. *Sturgis*, 5 Ha. 97.

(*q*) See *Hulme* v. *Tenant*, 1 Bro. C. C. 16; 1 Wh. & T. L. C. 4th edit. p. 481, and cases cited in next note.

(*r*) *Francis* v. *Wigzell*, 1 Madd. 258; and see *Murray* v. *Barlee*, 4 Sim. 82; *Owens* v. *Dickenson*, Cr. & P. 48; *Muston* v. *Bradshaw*, 10 Jur. 402, V.-C. E.; 15 Sim. 192; *Gaston* v. *Frankum*, 2 De G. & S. 561; reversed on other grounds, 16 Jur. 507; *Dowling* v. *Maguire*, Ll. & G. t. Pl. 1, 19; *Owen* v. *Homan*, 3 Mac. & G. 378; *Hughes* v. *Wells*, 9 Ha. 773.

(*s*) But see *Vaughan* v. *Vandersteyen*, 2 Drew. 183. The precise extent to which the separate estate of a married woman is liable for her general personal engagements, must still be regarded as unsettled. In a late case before the Court of Appeal, it was laid down that where a married woman having separate estate, and living apart from her husband,

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(4) *As to the parties to the suit.*

As to parties to the suit.

In general, it is only necessary to make those persons parties to a suit for specific performance who were parties to

contracts debts, the Court will impute to her an intention to deal with her separate estate, unless the contrary be clearly proved (*Johnson* v. *Gallagher*, 30 L. J. Ch. 298; 3 De G. F. & Jo. 494, where all the earlier cases are cited and very fully reviewed; see too *Blackford* v. *Woolley*, 9 Jur. N. S. 568); and Lord Justice Turner, though he carefully abstained from saying that the separate estate would in all cases be bound by a more general engagement, appears to have considered that neither on principle nor according to the weight of authority is there any sound distinction, as regards the liability of the separate estate, between specialty and simple contract debts, or between simple contract debts of different descriptions (see judgment). In a later case the soundness of this view was questioned by Lord Romilly, who held that the separate estate of a married woman is not liable after her death to satisfy her general engagements. (*Shattock* v. *Shattock*, L. R. 2 Eq. 182, and cases cited; and see and consider judgment; see too *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Hobday* v. *Peters*, 28 Beav. 354.) Where the married woman expressly charges her separate estate, or where she enters into a bond or covenant which can only be satisfied out of her separate estate, there is an intention expressed, or to be reasonably presumed, that she intended to bind her estate (see *Tullett* v. *Armstrong*, 4 Beav. 319); but where she contracts a mere general engagement, not purporting to bind her separate estate, the question whether she intended to bind the estate is mere matter of inference, to be gathered from all the circumstances of the case. In other words, "if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a feme sole, would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in this manner must depend upon the facts and circumstances of each case." (*Per* V.-C. Kindersley, in *Mrs. Matthewman's case*, L. R. 3 Eq. 781, where a married woman was held to have contracted for the purchase of shares out of her separate estate, and was placed on the list of contributories). The 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), exempted a husband from all liability in respect of his wife's debts contracted before the marriage, if such marriage were subsequent to the Act: but this section was repealed by the 37 & 38 Vict. c. 50, which in effect makes the husband liable for his wife's ante-nuptial debts to the extent of the assets which he receives with her. The former of these Statutes has greatly enlarged the capacity of a married woman to acquire, and her rights over, personal property: but it does not attempt to define the limits of the liability of her separate estate to answer her general personal engagements. See on this point *M'Henry* v. *Davies*, L. R. 10 Eq. 88.

Parties to contract are, in general, alone necessary parties to the suit.

Purchaser cannot join as co-defendant, receiver or steward.

Or parties claiming adverse interests prior to the contract.

the contract (*t*). For instance, a purchaser cannot join as co-defendants the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title deeds, delivery of which is sought by the suit (*u*); nor, it would seem, the wife of the vendor who has possessed herself of the deeds (*x*); nor a mortgagor, whose mortgagee, or mortgagee's trustee, has entered into the contract under a mortgage power of or trust for sale (*y*); nor, upon a sale by a mortgagor, the mortgagee, nor any person interested in the equity of redemption (*z*); nor a person who has joined the vendor in the sale in respect of other property, under conditions, as to laying out roads, &c., affecting the whole estate (*a*); nor, as a general rule, any person upon the ground of his claiming any adverse interest which was vested in him prior to the contract (*b*).

Person interested in contract, and bound to join in conveyance, not a necessary party to vendor's bill.

Nor need a stranger to a contract be made a party to a suit on the ground of his being interested in the contract, or bound to concur in the conveyance; as where, on the sale in two lots of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should be a party to the assignment of the other lot, for the purpose of entering into the covenants by way of indemnity usual in such cases, it was held, that the purchaser of lot 2 was not a necessary party to the vendor's bill for specific performance of the purchase of lot 1 (*c*): so, where a landowner agreed to sell land to a railway company, and to buy up his tenant's interest, it was held that the tenant was not a necessary party to the vendor's bill for specific performance and to

(*t*) *Humphreys* v. *Hollis*, Jac. 75; *Wood* v. *White*, 4 Myl. & C. 460; but see *Daking* v. *Whimper*, 26 Beav. 568.

(*u*) *M'Namara* v. *Williams*, 6 Ves. 143.

(*x*) *Muston* v. *Bradshaw*, 10 Jur. 402, V.-C. E.; 15 Sim. 192.

(*y*) *Clay* v. *Sharpe*, 18 Ves. 346, n.; *Corder* v. *Morgan*, ibid. 344.

(*z*) *Tasker* v. *Small*, 3 Myl. & C. 63; *Long* v. *Bowling*, 33 Beav. 585; See and consider *West Midland R. Co.* v. *Nixon*, 1 H. & M. 176; *Fenwick* v. *Bulman*, L. R. 9 Eq. 165, case of sub-purchaser.

(*a*) *Peacock* v. *Penson*, 11 Beav. see p. 359.

(*b*) *Delabere* v. *Norwood*, 3 Sw. 144; *Petre* v. *Duncombe*, 7 Ha. 24; Sug. 232; but see *Collett* v. *Hover*, 1 Coll. 227; and see as to multifariousness, *Inman* v. *Wearing*, 3 De G. & S. 732, and cases cited.

(*c*) *Paterson* v. *Long*, 5 Beav. 186.

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restrain trespass by the company (*d*). But in a suit not merely for specific performance but also for recovery of the possession, the party actually in possession, although no party to the contract, may properly be made a defendant (*e*). So too, a stranger to the contract may, by intermeddling in it,—as, *e. g.*, by claiming an interest in the purchase-money —make himself a proper party to a suit for specific performance (*f*),

Persons having adverse, inconsistent, or no rights, cannot join the vendor as co-plaintiffs,

Persons having rights adverse to, or inconsistent with, those of the vendor, or having no rights in the subject-matter of the suit, ought not to be joined with him as co-plaintiffs (*g*): and if, being infants, they were so joined in respect of adverse or inconsistent rights, the Court would, before the 15 & 16 Vict. c. 86 (*h*), have refused to make a decree, even by consent (*i*): nor, as a general rule, can parties claiming such rights be made defendants to the purchaser's bill (*k*): but they may, it would appear, (and this seems to form an exception from the above general rule,) be made defendants to the vendor's bill (*l*): and the Court has, by *consent*, made a decree in a suit for specific performance by several purchasers at the same sale (*m*).

but may be made defendants (*semble*).

(*d*) *Robertson* v. *Great Western R. Co.*, 10 Sim. 314, C.

(*e*) *Bishop of Winchester* v. *Mid-Hants R. Co.*, L. R. 5 Eq. 17; as to making persons who are not parties to a contract defendants in a suit to rescind it, see *Aberaman Ironworks Co.* v. *Wickens*, L. R. 4 Ch. Ap. 101.

(*f*) *West Midland R. Co.* v. *Nixon*, H. & M. 176.

(*g*) See *Fulham* v. *M'Carthy*, 1 H. L. C. 703; *Padwick* v. *Platt*, 11 Beav. 503: but see now as to misjoinder of plaintiff, 15 & 16 Vict. c. 86, s. 49.

(*h*) See sect. 49, and Morgan's Chancery Acts, p. 207, and cases there cited.

(*i*) See *Wood* v. *White*, 4 Myl. & C. 483.

(*k*) *Tasker* v. *Small*, 3 Myl. & C. 63; *De Hoghton* v. *Money*, L. R. 2 Ch. Ap. 164, 170; but see and consider *West Midland R. Co.* v. *Nixon*, *ubi suprà*, and V.-C. Wood's comments on *Tasker* v. *Small*; and see *Daking* v. *Whimper*, 26 Beav. 568, where the trustees of a prior voluntary settlement by the vendor were brought before the Court by the purchaser, seeking specific performance; and see *Fenwick* v. *Bulman*, L. R. 9 Eq. 165; Dan. Ch. Pr. 224.

(*l*) See Calv. on Part. 329; *Evans* v. *Jackson*, 8 Sim. 217; *Sanders* v. *Richards*, 2 Coll. 568; and see Lord Langdale's remark as to the judgment creditors, in *Lord Leigh* v. *Lord Ashburton*, 11 Beav. 474.

(*m*) *Hargreaves* v. *Wright*, 10 Ha. Append. 56.

However, where, at a sale by auction, it was arranged that a portion of lot A. should be sold as part of lot B., it was on a bill being filed by the purchaser of lot A. for specific performance according to the particulars, held, that the purchasers of lot B. were necessary parties: upon the special ground that the vendor ought not to remain exposed to another suit by the purchaser of lot B. for specific performance according to the arrangement at the sale (*n*).

Purchaser of one lot when necessary party to suit in respect of another lot.

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in any suit for specific performance by the principal: inasmuch as the performance of the covenant with the principal would be no defence to an action at Law by the agent (*o*).

Agent must be party if contract under seal.

Generally, however, the contract is not under seal; but, even then, if the agency be not apparent on the contract, the nominal contractor should (unless the plaintiff can prove the agency,) be made a party to the suit, as a defendant (*p*), in order to bind his apparent interest (*q*): and, although an action at Law might in such a case be maintained by either agent or principal, if a bill be filed the parties beneficially interested in the contract must be parties to the suit (*r*). So, an auctioneer is sometimes made a co-plaintiff with the vendor, upon the ground either of his having an interest in the contract, or of his liability to an action for the deposit (*s*). But, if the agent has or claims no interest in the contract or

When to be made party, if contract not under seal.

Auctioneer, when and why made party.

Agent, when

(*n*) *Mason* v. *Franklin*, 1 Y. & C. C. C. 239. In general, purchasers of different lots cannot be joined as co-defendants: *Rayner* v. *Julian*, 2 Dick. 177; *Brookes* v. *Lord Whitworth*, 1 Madd. 86.

(*o*) See *Cooke* v. *Cooke*, 2 Vern. 36; *Cope* v. *Parry*, 2 Jac. & W. 538.

(*p*) See and consider *Fulham* v. *M'Carthy*, 1 H. L. C. 703; *Chadwick* v. *Maden*, 9 Ha. 188.

(*q*) Dan. Ch. P. 192; *Taylor* v. *Salmon*, 4 Myl. & C. 131; and see *Nelthorpe* v. *Holgate*, 1 Coll. 217, 218, where it was held that an agent might join as co-plaintiff.

(*r*) *Small* v. *Attwood*, 1 You. 457; the words "suit" and "contract" in lines 10 and 11, should evidently be transposed.

(*s*) See Dan. Ch. P. 191, 192, 207; *sed quære*, as to the deposit; *vide suprà*.

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an improper party.

the subject-matter thereof, and is under no liability in respect of the contract, he is an improper party to the suit (*t*); and it seems probable that he ought not, at least as a defendant, to be made a party in respect of his supposed liability to pay damages or restore the deposit (*u*).

Death of vendor—who then entitled to sue purchaser, and who proper parties to suit.

If the vendor die before completion, his personal representatives, as being entitled to the purchase-money, are *primâ facie* the proper plaintiffs. If the personal estate has been vested in trustees under an order of the Court, and a bill is filed by such trustees, the personal representative is still a necessary party (*x*); and unless the plaintiffs have power to convey the vendor's interest in the estate (*y*), the person in whom the same is vested, or who has power to convey it, must also be made a party (*z*): but if there are devisees, or if the executors are empowered to sell, the heir is said to be an unnecessary party (*a*); as the purchaser has no right to insist on proof of the will against the heir (*b*); or to require his concurrence (*c*); unless, it is conceived, there is reasonable ground for disputing the validity of the will. In one case, although special circumstances, tending to impeach the validity of the will, were held to entitle the purchaser, the defendant, to have it proved against the heir, it does not appear to have been considered that the heir should have been made a party; but the cause stood over

Heir, when unnecessary party.

(*t*) *King of Spain* v. *Machado*, 4 Russ. 225, 240; *Kingsley* v. *Young*, cited Dan. Ch. P. 193.

(*u*) See *Kendall* v. *Beckett*, 2 Russ. & M. 90; *Sainsbury* v. *Jones*, 5 Myl. & C. 1, 4.

(*x*) See *Cave* v. *Cork*, 2 Y. & C. C. C. 130, 133.

(*y*) *I. e.*, the estate, whether legal or merely equitable, which the vendor held subject to the contract; see *Roberts* v. *Marchant*, 1 Ha. 547.

(*z*) *Roberts* v. *Marchant*, 1 Ha. 547.

(*a*) See Calv. on Par. 327. See, now, General Orders, vii. 1, as to the heir being an unnecessary party to a suit relating to the devised land.

(*b*) *Colton* v. *Wilson*, 3 P. Wms. 192; *Bellamy* v. *Liversidge*, Sug. 439; and see *Morrison* v. *Arnold*, 19 Ves. 673; *Weddall* v. *Nixon*, 17 Beav. 160; see *Boyse* v. *Lord Rossborough*, Kay, 71; 3 De G. M. & G. 817; 6 H. L. Ca. 2; *Boyse* v. *Colclough*, 1 K. & J. 124; 6 H. L. Ca. 1; *Chadwick* v. *Maden*, 9 Ha. 188; *Lovett* v. *Lovett*, 3 K. & Jo. 1; and as to how the right of the heir to an issue *devisavit vel non* may be lost, see *Williams* v. *Williams*, 9 Jur. N. S. 1267; see, too, *Cowgill* v. *Rhodes*, 33 Beav. 310.

(*c*) *M'Culloch* v. *Gregory*, 3 K. & Jo. 12.

that the vendor might file a bill against him to establish the will (*d*). If the vendor have devised the estate in strict settlement, the trustees, the persons (if any) in whom the first estate of inheritance is vested (*e*), and the intermediate tenants for life (*f*), and the owners (if ascertained) of any intermediate contingent or executory estates (*g*), must be made parties.

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Who, in such a case, proper parties to purchaser's bill.

So, the personal representatives of the vendor, and the persons who have power to convey his estate, are the proper parties to a purchaser's bill (*h*).

Alienation of vendor's interest by act *inter vivos* —who, proper parties to suit against or by, purchaser.

So, if the vendor have, by act *inter vivos*, assigned his interest under the contract, he, or if he be dead, his personal representative, must be a party to the assignee's bill as defendant; or, if such interest be recoverable *at Law*, either as defendant or as co-plaintiff (*i*). So, if subsequently to the contract the vendor have aliened or incumbered the estates contracted for, the weight of authority seems to show that the alienees or incumbrancers, if they took with notice of the contract, may be made defendants to the purchaser's bill (*k*).

***Cestuis que trust*, when unnecessary parties.**

When the estate is vested in trustees in trust to sell and pay the proceeds to specified persons with power to give receipts, the *cestuis que trust* are not necessary parties to the suit (*l*). By the 30th Order of August 1841, it was

(*d*) *Grove* v. *Bastard*, 2 Ph. 619; the heir appears to have been made a defendant in *Colton* v. *Wilson*, 3 P. Wms. 192; and see now as to proving a will in solemn form, 20 & 21 Vict. c. 77, ss. 61, 62, 64.

(*e*) *Hopkins* v. *Hopkins*, 1 Atk. 590.

(*f*) *Gore* v. *Stacpoole*, 1 Dow. 18, 31.

(*g*) Dan. Ch. P. 221, 222, 254.

(*h*) See Calv. on Part. 327.

(*i*) See *Fulham* v. *M'Carthy*, 1 H. L. C. 703, 722; Dan. Ch. P. 227; *Ryan* v. *Anderson*, 3 Madd. 174; and see 5 Ha. 554; *Padwick* v. *Platt*, 11 Beav. 503.

(*k*) See *Daniels* v. *Davison*, 16 Ves. 249; *Echliff* v. *Baldwin*, *ib.* 267; *Spence* v. *Hogg*, 1 Coll. 225; *Collett* v. *Hover*, *ib.* 227; *Potter* v. *Sanders*, 6 Ha. 1; Dan. Ch. P. 223; *Shaw* v. *Thackray*, 1 Sm. & G. 537; but see *contrà*, *Cutts* v. *Thodey*, 1 Coll. 223; *Leuty* v. *Hillas*, 2 De G. & Jo. 110; 4 Jur. N. S. 1166; Calv. on Part. 325; Dan. Ch. Pr. 225.

(*l*) *Wakeman* v. *Duchess of Rutland*, 3 Ves. 233; *Binks* v. *Lord Rokeby*, 2 Madd. 227; *Potts* v. *Thames Haven Co.*, 15 Jur. 1004, V.-C. P.

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provided that in all suits concerning real estate vested in trustees by devise, such trustees, if competent to sell and to give a discharge for the purchase-money, should represent their *cestuis que trust* in the same way as executors or administrators, in suits concerning personal estate, represent the parties beneficially interested; and in such cases, it was unnecessary to bring the *cestuis que trust* before the Court; but this provision was only applicable to cases where the trustees had the legal estate (*m*), and derived their title under a devise. This Order was abrogated by the Consolidated Orders (*n*), having been rendered unnecessary by the 15 & 16 Vict. c. 86, which provides (*o*) that in all cases concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, the trustees shall represent their *cestuis que trust*, and the latter need not be brought before the Court. It has been held that executors with an express power of sale are trustees within the meaning of the Act (*p*). By the rules of Procedure under the Judicature Act, 1873, (*q*), trustees, executors and administrators, may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any parties beneficially interested in the trust or estate; and are to be considered as representing such parties in the action: but the Court or a Judge may at any stage of the proceedings order any of such parties to be made parties to the action, either in addition to or in lieu of the previously existing parties thereto.

Rules under New Procedure.

Death of purchaser—who entitled to sue vendor, and who proper parties to suit.

If the purchaser die before completion, his heir or devisee, (if the estate be one of inheritance,) is the party entitled to sue for specific performance, making the personal representatives parties, if he seek payment of the purchase-money

(*m*) *Turner* v. *Hind*, 12 Sim. 414.

(*n*) Prel. Order, r. 1.

(*o*) See sect. 42, r. 9. This enactment is retrospective; see *Fowler* v. *Bayldon*, 9 Ha. 78.

(*p*) *Shaw* v. *Hardingham*, 2 W. R. 657; *Smith* v. *Andrews*, 1 W. R. 353. *Secus*, where the power of sale is implied; *Bolton* v. *Stannard*, 6 W. R. 570; but see now 22 & 23 Vict. c. 35, s. 14.

(*q*) See rule 14; and see generally as to parties, rules 9 to 17 in the schedule to the Act.

out of the personal estate (r): so, on a bill filed by the vendor, the heir or devisee of the purchaser is a necessary party to the suit (s): so, if the bill be filed against the heir or devisee of the purchaser, the personal representatives must be made parties, because the purchase-money is primarily payable out of the personal estate (t).

Or to suit by vendor.

Alienation of purchaser's interest by act *inter vivos* —who proper parties to suit, by or against vendor.

If the purchaser has assigned the benefit of the contract, the suit against the vendor for specific performance should, it would seem, be by the assignee (u), making the purchaser a defendant. If, however, the purchaser merely enter into an ordinary agreement for a sub-sale, agreeing himself to convey the estate, and not that the original vendor shall convey it, the sub-purchaser is not, in general, a necessary or proper party to a suit for the performance of the original contract (x).

Purchaser not to be party if his assignee has been accepted by vendor.

And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit (y).

An administrator *ad litem*, when may be appointed by the Court.

By the 44th section of the 15 & 16 Vict. c. 86, where, in any suit or other proceeding, it appears that any deceased person, who was interested in the matters in question, has no legal personal representative, the Court may either proceed in the absence of such a representative, or may appoint an administrator *ad litem*. Thus, where in a suit by a lessor for specific performance of an agreement for a lease,

(r) *Broome* v. *Monk*, 10 Ves. 597; *Buckmaster* v. *Harrop*, 13 Ves. 456; *vide suprà*, p. 265; but see now 30 & 31 Vict. c. 69.

(s) *Townsend* v. *Champernowne*, 9 Pri. 130.

(t) Dan. Ch. Pr. 274.

(u) See *Fulham* v. *M'Carthy*, 1 H. L. C. 703, 717; *Padwick* v. *Platt*, 11 Beav. 503; but see *Nelthorpe* v. *Holgate*, 1 Coll. 203; *Moxhay* v. *Inderwick*, 11 Jur. 837.

(x) See *Anon.* v. *Walford*, 4 Russ. 372; *Chadwick* v. *Maden*, 9 Ha. 188; see, a case of special circumstances, *South E. R. Co.* v. *Knott*, 10 Ha. 122; and compare *Fenwick* v. *Bulman*, L. R. 9 Eq. 165; *Aberaman Company* v. *Wickens*, L. R. 4 Ch. Ap. 101; and see Rule 17 of the new Rules of Procedure.

(y) *Holden* v. *Hayn*, 1 Mer. 47; *Hall* v. *Laver*, 3 Y. & C. 191; see *Hemingway* v. *Fernandes*, 13 Sim. 228; *Shaw* v. *Fisher*, 5 De G. M. & G. 596.

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one of the defendants died, after the filing of the bill, intestate and insolvent, and his next of kin refused to take out administration, the Court appointed an administrator *ad litem* (z).

Section 5.

As to the bill.

(5.) *As to the Bill or Statement of Complaint.*

Suit may now be commenced by bill or claim.

A suit for specific performance must hitherto have been commenced by bill or (where the purchase-money does not exceed 500*l.*) by plaint under the County Courts Equitable Jurisdiction Act (*a*); but when the Judicature Act, 1873, comes into operation, as it probably will have done before these remarks are published, the suit or action, as it will then be termed, will be commenced in the High Court of Justice, by a writ of summons, with a statement endorsed upon it of the nature of the claim made, or of the relief required (*b*); and the plaintiff within the time and in the manner prescribed by Rules of Court is to file and deliver to the defendant after his appearance, a statement of his complaint and of the relief or remedy which he claims, unless the defendant at the time of his appearance states that he does not require such a statement (*c*). It is conceived that in suits for specific performance, such a statement will seldom be dispensed with; and as the form of it will differ only in name from a bill in Chancery, the general rules of pleading will remain unaltered. According to the present practice the mode of procedure is the same, whether the suit be in Chancery or in the County Court; and, except where otherwise noticed, the following remarks are applicable to cases falling under either jurisdiction (*d*).

As to form of bill.

It has been held that if the bill state that the agreement

(z) *Tyrratt* v. *Lloyd*, 2 Jur. N. S. 371; and for cases under this section, see Morgan, 200, 201.

(*a*) 28 & 29 Vict. c. 99, s. 1, order 1, r. 1.

(*b*) See Rules of Procedure, r. 2.

(*c*) Rule 18.

(*d*) As to which *vide infrà*, s. 6.

was in writing, it need not allege signature (*e*): nor that it was duly stamped (*f*). But the mere allegation of an agreement, without any statement that it was in writing, is nothing more than an allegation of a verbal agreement; and, unless from the other averments in the pleadings a written agreement must necessarily be presumed, the bill is demurrable (*g*).

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It need not allege signature of agreement.

Where letters are relied upon, they may be stated in the bill, either as constituting the agreement, or as evidence of a parol agreement; in the latter case, it will be necessary to prove other matter sufficient to take the case out of the Statute (*h*).

Letters, how to be referred to.

As a general rule, the bill need not state inferences or results of law arising from the facts alleged. It has, however, been held that a vendor meaning to rely on the purchaser's waiver of his *primâ facie* right to a marketable title, must allege or charge such waiver; and that it is not sufficient to allege facts which, if proved, would be evidence of it (*i*). But, on the other hand, it is improper to introduce general charges or averments of waiver, &c., unsupported by a statement of the particular facts. The party ought so to frame his case upon the record, that the Court can fairly see what the case is which is to be relied on (*k*); but he should do so without unnecessary prolixity (*l*).

Inferences of law, whether to be stated.

Waiver relied on should be alleged; and facts supporting it should be stated.

It has been held that a bill which shows that a specified consent is requisite to enable the plaintiff to perform the

Omission to state requisite consent.

(*e*) *Rist* v. *Hobson*, 1 S. & S. 543; *Field* v. *Hutchinson*, 1 Beav. 599; *Barkworth* v. *Young*, 4 Drew. 1.

(*f*) Dan. Ch. Pr. 341.

(*g*) *Barkworth* v. *Young*, 4 Drew. 1, 11; and see *Redding* v. *Wilkes*, 3 Bro. C. C. 400; Dan. Ch. Pr. 340; but see *Spurrier* v. *Fitzgerald*, 6 Ves. 548; *Rist* v. *Hobson*, 1 S. & S. 543.

(*h*) See *Birce* v. *Bletchley*, 6 Madd. 17; *Skinner* v. *M'Douall*, 2 De G. & S. 265.

(*i*) *Clive* v. *Beaumont*, 1 De G. & S. 397; and *Gaston* v. *Frankum*, 2 De G. & S. 561, reversed on other points, 16 Jur. 507.

(*k*) See *Hunter* v. *Daniel*, 4 Ha. 432.

(*l*) See Rule 18 of the new Rules of Procedure.

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held immaterial.

contract, but omits to state that such consent has been obtained, is not therefore demurrable (*m*).

Where the contract is conditional, the performance of the condition should be

Where the contract is originally conditional, the performance of the condition should be alleged; so, where it purports to be signed by an agent, the fact of the agency, and the authority of the agent, should be alleged; so, also, the plaintiff should state that he has performed, or been ready and willing to perform, his part of the agreement; and that there is no incapacity in the defendant to complete it (*n*). If damages are claimed, some special injury must be shown: a mere general allegation that the plaintiff has sustained damage being insufficient (*o*).

Prayer for general relief, what relief can be obtained under.

According to the present practice, the plaintiff cannot, under the prayer for general relief, obtain a decree inconsistent with either the specific case made, or the specific relief prayed by the bill (*p*). For instance, it has been held that a vendor who, through want of title, fails to obtain a decree for specific performance against a purchaser in possession cannot, under the prayer for general relief, obtain an account of the rents and profits; although the defendant by his answer state his readiness to pay a fair rent (*q*): nor, where he fails in proving the agreement alleged by his bill, can he, in general, take a decree for performance of a different agreement admitted by the defendant's answer (*r*): nor can he, under the general prayer, obtain relief which, although consistent

(*m*) *Smith* v. *Capron*, 7 Ha. 185.

(*n*) See *Columbine* v. *Chichester*, 2 Phil. 27.

(*o*) See *Chinnock* v. *Marchioness of Ely*, 2 H. & M. 220; reversed on other grounds, 6 N. R. 1.

(*p*) See authorities cited in notes (*q*), (*r*), (*s*), and (*u*), and see *Hiern* v. *Mill*, 13 Ves. 119; *Cockerell* v. *Dickens*, 1 M. D. & D. G. 45, 81, Priv. C.; *Hill* v. *Gt. N. R. Co.*, 5 De G. M. & G. 72; *White* v. *Cuddon*, 8 Cl. & Fin. 766; *Cuddon* v. *Tite*, 1 Giff. 395; 4 Jur. N. S. 579.

(*q*) *Williams* v. *Shaw*, 3 Russ. 178, n.

(*r*) *Legal* v. *Miller*, 2 Ves. S. 299; but see *Mortimer* v. *Orchard*, 2 Ves. jun. 243; *Jeffrey* v. *Stephens*, 8 Jur. N. S. 947, where the plaintiff had, up to the hearing, repudiated the agreement set up by the defendant's answer: and see *Hanbury* v. *Litchfield*, 2 Myl. & K. 629; in which, under special circumstances, the plaintiff obtained a decree.

with the specific relief, is yet sustained only by allegations which have been introduced merely as showing his right to the specific relief (*s*): and, in general, where a bill has been filed making a case of actual fraud (*t*), the right to relief being rested on that ground, and such fraud has been disproved or not established, the Court has not allowed the bill to be used for any secondary purpose, but has dismissed it with costs (*u*); unless it alleged other matter on which the Court could ground a decree (*x*).

The Judicature Act, 1873 (*y*), with the view of preventing multiplicity of legal proceedings, makes it obligatory on the Court to grant relief in any matter or cause pending before it, in respect of any legal or equitable claim properly brought forward in such cause or matter. But this section, while it requires the Court to deal finally with every claim which properly comes before it, will not, it is conceived, entitle a plaintiff to any relief, except *secundum allegata et probata*.

As to plaints for specific performance under the County Courts Equitable Jurisdiction Act.

By the County Courts Equitable Jurisdiction Act (*z*), proceedings for the specific performance of agreements are to be taken in the County Court, within the district of which the defendant, or any one of several defendants resides, or carries on business; and, by the recent Amendment Act (*a*), a plaint may be entered in the County Court within the district of which the defendant, or one of the defendants dwells, or carries on his business, at the time of bringing the action or suit; or it may, by leave of the Judge or Registrar, be entered

(*s*) *Stevens* v. *Guppy*, 3 Russ. 171, 185.

(*t*) The mere use or omission of the word "fraud," is immaterial, if acts are alleged which amount to fraud; *M'Calmont* v. *Rankin*, 8 Ha. 15.

(*u*) *Glascott* v. *Lang*, 2 Ph. 310, 322; and see *Wilde* v. *Gibson*, 1 H. L. C. 621; *Ferraby* v. *Hobson*, 2 Ph. 255: and *Maguire* v. *O'Reilly*, 3 J. & L. 224, 240; *Price* v. *Berrington*, 3 Mac. & G. 486, 498; *Curson* v. *Belworthy*, 3 H. L. C. 742; Dan. Ch. Pr. 309.

(*x*) See *Archbold* v. *Com. of Donations*, 2 H. L. C. 440, 446; *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Espey* v. *Lake*, 10 Ha. 260; *Parr* v. *Jewell*, 1 Kay & J. 671, 674.

(*y*) 36 & 37 Vict. c. 66, sect. 24, sub-sect. 7.

(*z*) 28 & 29 Vict. c. 99, s. 10.

(*a*) 30 & 31 Vict. c. 142, sect. 1.

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in the County Court within the district of which the defendant, or one of the defendants, dwelt or carried on business at any time within six calendar months next before the time of action or suit brought; or, with the like leave, in the County Court in the district of which the cause of action or suit wholly or in part arose. The "residence" or "dwelling" contemplated by these sections is a permanent and not a merely temporary residence. Thus, in one case, where a person rented a furnished house in the Isle of Wight for a period of six months, to which he moved a portion of his establishment, but retained his residence in town, service, without special leave, at the latter place, of a plaint for the specific performance of a contract for the purchase of land in the Island was held to be irregular; and the plaint was dismissed with costs (*b*). But where a defendant has no permanent dwelling-place, a place where he is temporarily residing, as, *e.g.*, the house of a friend, may, it seems, constitute a sufficient residence or dwelling within the meaning of the Acts (*c*).

Under the Amendment Act.

The jurisdiction which, by the 28 & 29 Vict. c. 99, was conferred on County Courts in cases of specific performance, has, by the 30 & 31 Vict. c. 142, s. 9, been extended to all cases for the specific performance of, or for the reforming, delivering up, or cancelling of, any agreement for the sale, purchase, or lease of any property, where, in the case of a sale or purchase, the purchase-money, or, in the case of a lease, the value of the property does not exceed 500*l*. (*d*). Unless in the case of a purchase the price to be paid is a gross sum, it would seem that the County Courts have no jurisdiction under the Acts.

(*b*) *Burt* v. *Vincent*, before the Judge of the County Court of Hants, at Newport, 23 Sept. 1869. See, too, *Macdougall* v. *Paterson*, 11 C. B. 755, a case under the similar wording of 9 & 10 Vict. c. 95, s. 128. As to where the defendant has more than one residence, see *Butler* v. *Ablewhite*, 6 C. B. N. S. 740; 28 L. J. C. P. 292; *Pilgrim* v. *Knatchbull*, 31 L. J. C. P. 257.

(*c*) *Alexander* v. *Jones*, L. R. 1 Ex. 133, also a case on the 9 & 10 Vict. c. 95, s. 128.

(*d*) Prior to the Amendment Act, it was held that the County Court might entertain a suit for the specific performance of an agreement to grant a lease; see *Wilcox* v. *Marshall*, L. R. 3 Eq. 270.

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Appeals from the County Courts.

According to the present practice, an appeal lies from the decision of a County Court Judge under these Acts to the High Court of Chancery; or, in causes arising within the County Palatine of Lancaster either to the High Court of Chancery, or to the Chancery Court of the County Palatine (e); and any proceedings in Equity commenced in the High Court of Chancery may be ordered to be transferred to the County Court in which they might have been instituted (f). Under the Judicature Act, 1873, the appeal will lie to Divisional Courts of the High Court of Justice; and, except by special leave, there is no further right of appeal (g) The equitable jurisdiction conferred on County Courts (h) has not ousted the jurisdiction of the High Court of Chancery (i). A plaintiff coming into the latter Court, when he might have sued in the County Court, has been held entitled only to such costs as he would have obtained in the County Court (k); but in a recent case Sir Geo. Jessel, M.R., disapproved of this decision, and allowed a plaintiff in a suit to foreclose a mortgage for 50*l*, his usual costs in Chancery (l).

Costs.

Section 6.

As to the late mode of proceeding by claim, &c.

(6) *As to the late mode of proceeding by Claim under the Orders of April,* 1850: *and as to Special Cases under the* 13 & 14 *Vict. c.* 35.

Proceedings by claim under the Orders of April, 1850.

Under the Orders of April, 1850, any person seeking equitable relief might, without special leave of the Court, and instead of proceeding by bill in the usual form, file

(e) 28 & 29 Vict. c. 99, ss. 18, 19. The senior Vice-Chancellor hears the appeals.

(f) 30 & 31 Vict. c. 142, s. 8; as to the power of transferring causes under the Act of 1873, see sect. 90.

(g) 36 & 37 Vict. c. 66, s. 45.

(h) Under the Act of 1873 County Courts within the limits of their jurisdiction will have all the powers of the High Court of Justice; 36 & 37 Vict. c. 66, s. 89.

(i) *Scotto* v. *Heritage*, L. R. 3 Eq. 212, a suit to foreclose a mortgage for 50*l.*; *Brown* v. *Rye*, L. R. 17 Eq. 343.

(k) *Simons* v. *M'Adam*, L. R. 6 Eq. 324; but see *Scotto* v. *Heritage*, *ubi suprà*.

(l) *Brown* v. *Rye*, *ubi suprà*.

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a claim in the Record and Writ Clerks' Office, in (among other specified cases) any case where the plaintiff was, or claimed to be, a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance: such claim to be in the form, and to the effect, of the form No. 8 set forth in the Schedule A. to the said Orders; and the filing of such claim was to have the force and effect of filing a bill (*m*):

Special claim.

and in any case in which the above form was not applicable, the Court might, upon the *ex parte* application of the plaintiff, and upon reading the claim proposed to be filed, give leave to file it.

This mode of proceeding could be adopted only in clear and simple cases (*n*): that is, when the issue was simple, although the affidavits might be heavy (*o*). All the material facts of the case within the plaintiff's knowledge had to be stated (*p*); and, as in an ordinary suit, he was obliged to establish his case *secundum allegata et probata* (*q*). This mode of procedure, which had practically been rendered obsolete by the practice of moving for a decree under the 15 & 16 Vict. c. 86 (*r*), was abolished as from the 14th February, 1860, by the 8th Consolidated Order, rule 4.

As to proceeding by special case under 13 & 14 Vict. c. 35.

An apparently, rather than a really, inexpensive and easy mode of obtaining the opinion of the Court, where the parties agree upon the facts but differ as to the law, is provided by a modern Act (*s*); which enables persons interested, or claiming to be interested, in any question cognizable in the Court of Chancery as to the construction of any Act of Parliament, will, deed, or other instrument in writing; or any article, cause, matter, or thing therein

(*m*) See Orders 1 & 2.

(*n*) See *Jackson* v. *Grant*, 15 Jur. 72, V.-C. R.; *Smith* v. *Constant*, 4 De G. & S. 213; *Rawlings* v. *Dalgleish*, 1 Sm. & G. 76; *Eccles* v. *Cheyne*, 9 Ha. 215; *Burnley* v. *E. C. R. Co.*, 5 De G. & S. 314.

(*o*) *Jacobs* v. *Richards*, 18 Beav. 308.

(*p*) *Goode* v. *West*, 15 Jur. 1025 V.-C. T.; 20 L. J. 631.

(*q*) *Johns* v. *Mason*, 9 Ha. 29.

(*r*) Sects. 15 & 16.

(*s*) 13 & 14 Vict. c. 35.

contained; or as to the title, or evidence of title, to any real or personal estate contracted to be sold or otherwise dealt with; or as to the parties to, or the form of, any deed or instrument for carrying any such contract into effect; or as to any other matter falling within the original jurisdiction of the Court as a Court of Equity, or made subject to its jurisdiction or authority by any Statute (not being a Statute relating to bankrupts); and including among such persons, all lunatics, married women, and infants, (in manner and under the restrictions thereinafter contained,) to concur in stating such question in the form of a special case for the opinion of the Court; and executors, administrators, and trustees, are authorized to concur in such case (*t*).

Who must be parties to.

As a general rule, all the persons who are interested in all the questions to be determined must, as in the case of a suit instituted by bill (*u*), be made parties to the special case (*x*); but the modifications of this rule, which were introduced by the Chancery Improvement Act (*y*) seem applicable to this mode of procedure (*z*). A special case may be amended (*a*); so, also, on the death of a sole plaintiff, the common order for revivor may be obtained; the object of the Statute being to assimilate the practice on special cases in all respects to that in suits instituted by bill (*b*): but it seems that the person named as plaintiff may not sue on behalf of himself and other members of a class in the same interest (*c*). Where the object of the special case is to ascertain the construction of a trust instrument, the trustees ought to be parties (*d*),

Special case, how to be framed, &c.

Every such special case is to state, concisely, such facts and documents as may be necessary to enable the Court to

(*t*) Sect. 1.

(*u*) Sect. 32.

(*x*) *Entwistle* v. *Cannon*, 4 W. R. 450.

(*y*) 15 & 16 Vict. c. 86, s. 42.

(*z*) *Swallow* v. *Binns*, 9 Ha. App. xlvii.; *Re Brown*, 29 Beav. 401.

(*a*) *Domville* v. *Lamb*, 9 Ha. App. lv.; *Thistlethwaite* v. *Gamier*, 5 De G. & S. 73; *Bell* v. *Cade*, 2 J. & H. 122; *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. Ap. 93.

(*b*) *Wilson* v. *Whateley*, 1 J. & H. 331.

(*c*) *Lee* v. *Head*, 1 K. & Jo. 620, 625; but see 15 & 16 Vict. c. 86, ss. 44, 51; *Re Brown*, 29 Beav. 401.

(*d*) *Vorley* v. *Richardson*, 8 De G. M. & G. 126; 2 Jur. N. S. 362.

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decide the question raised thereby; and, upon the hearing, the Court and the parties may refer to the whole contents of such documents; and the Court may draw from the facts and documents any inference which it might have drawn therefrom if proved in a cause (e); but will not direct an inquiry as to facts of which it is not satisfied at the hearing (f); nor act on the mere inference or belief of the parties (g); and, unless the facts are fully and fairly stated, may refuse to make an order (h).

To be signed by counsel, filed, and appeared to.

Every special case is to be signed by counsel for all parties (i), and is to be filed as a bill is filed, and the defendants are to appear thereto as to a bill (k). The same counsel may sign for plaintiff and defendants (l); but infants should be represented by separate counsel at the hearing (m).

Parties after case filed are to be subject to the jurisdiction, and be bound by statements in case, subject to what restrictions.

After the case has been filed, and the defendants have appeared, all the parties are to be subject to the jurisdiction of the Court, as if the plaintiff had filed a bill against the defendants, and they had appeared thereto; and, upon the case being filed and appearances entered, all parties thereto, other than married women, infants, and lunatics, are, for the purposes of such special case, to be bound by the statements therein; and married women, infants, and lunatics, made parties thereto, are, for the purposes thereof, to be bound by the statements therein, when and not before, leave shall have been given by the Court to set the case down (n).

Court upon hearing may make mere

Upon the hearing, the Court may determine the questions raised or any of them; and may make a declaration of right

(e) 13 & 14 Vict. c. 35, s. 8.

(f) *Domville* v. *Lamb*, 9 Ha. App. lv.; which see also as to the mode in which the statements are to be made. See, too, *Gosling* v. *Gosling*, Johns. 265; *Bell* v. *Cade*, 2 J. & H. 122.

(g) *Domville* v. *Lamb*, *ubi suprà*.

(h) *Bulkeley* v. *Hope*, 8 De G. M. & G. 36.

(i) By the Rules of Court under the Judicature Act, 1873, a special case is to be printed and signed by the *several parties or their solicitors*.

(k) Sect. 10.

(l) *Ex parte Craig*, 15 Jur. 763.

(m) *Wright* v. *Woodham*, 17 Law Times, 293.

(n) Sect. 11. As to the practice when a party interested is born after the case is set down, see *Thistlethwaite* v. *Garnier*, 21 L. J. 16, V.-C. P.

without proceeding to administer any consequent relief; and every such declaration is to have the force of a decree in a suit between the same parties; and the Court may send a case for the opinion of a Court of Law; or may refuse to give any decision (*o*): and it may deal with the costs of the special case (*p*): but it cannot go on to decree specific performance (*q*); nor can it, apparently, make a declaratory decree which will bind reversionary interests (*r*), though it may, it would seem, declare whether the party claiming as reversioner takes such an interest in the property as entitles him to file a bill to have it secured for his benefit (*s*).

declaration of right, send a case to Law, or refuse to decide.

As between vendor and purchaser, the Court has on special case determined whether a mistake in the particular was a fit subject for compensation within the conditions (*t*); and where no mode of estimating the amount is provided, the Court may, it seems, direct a reference to chambers (*u*); so it has decided whether, according to the true construction of a will, a good title has been deduced by vendors purporting to sell under it (*x*); so, too, whether a proposed lease is in conformity with the terms of a leasing power (*y*).

What the Court will determine as between vendor and purchaser, on a special case.

The Act also contains provisions supplying the requisite machinery for protecting and binding the interests of infants, lunatics, and married women; and for the indemnity of trustees, &c., acting upon declarations made under the Act (*z*). The proceeding by special case seems to have one

Provisions respecting parties under disability, and trustees, &c.

(*o*) Sect. 14.

(*p*) *Jackson* v. *Craig*, 15 Jur. 811; *Evans* v. *Evans*, 22 L. T. 43, V.-C. K.

(*q*) *S. C.*

(*r*) See *Garlick* v. *Lawson*, 10 Ha. App. xiv.; *Greenwood* v. *Sutherland*, *ib.* xii.; *Jackson* v. *Turnley*, 1 Dre. 617; *Gosling* v. *Gosling*, Johns. 265, and cases there cited; *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. Ap. 93; but see *Brooke* v. *Brooke*, 3 Sm. & G. 280.

(*s*) *Bell* v. *Cade*, 2 Johns. & H. 122.

(*t*) *Leslie* v. *Thompson*, 9 Ha. 268. Such a question may now be more conveniently and at less expense determined by a summons under the Vendor and Purchaser Act, 1874.

(*u*) *Ibid.*

(*x*) *Wilson* v. *Bennett*, 20 L. J. Ch. 279.

(*y*) *Edwards* v. *Milbank*, 4 Drew. 606.

(*z*) Sects. 2, 3, 4, 5, 6, 7, 13, and 15. An infant may, under sect. 5, apply for the appointment of a guardian without a next friend; *Ex parte Craig*, 15 Jur. 763; and see generally as to the practice in special cases, Daniell, 1681, *et seq.*

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advantage over a suit in the ordinary course, *viz.*, that special cases are not usually transferred from the cause-list of the judge in whose branch of the Court they are set down: so that the parties, if they can agree upon the facts, are able to secure the opinion of any particular judge.

Special cases under Judicature Act 1873.

Under the Judicature Act, 1873, the Court will have power to order any question of law to be determined by special case (*a*); and after a writ of summons has been issued, the parties may concur in stating the questions of law arising in the action in the form of a special case, which is to state concisely such facts and documents as may be necessary to enable the Court to decide the questions raised (*b*).

Declaration of right under the Chancery Improvement Act.

By the 50th section of the 15 & 16 Vict. c. 86, no suit is to be open to objection on the ground that a merely declaratory decree or order is sought; and the Court has power to make binding declarations of right without granting consequential relief. This section has been held to apply only to cases in which equitable relief might be granted if the plaintiff chose to ask for it (*c*); and not to authorize a decree declaratory of merely legal rights (*d*), or binding reversionary interests (*e*).

(7.) *As to how the plaintiff's case may be sustained in the absence of a written agreement:—fraud:—part performance:—admission by defendant of parol agreement: parol variation of written agreement.*

As to how plaintiff's case may be sustained, &c.

Written agreement when dispensed with.

Although in general (*f*), there must, in order to sustain a suit for specific performance, be a contract in writing within the Statute of Frauds, the Court, in certain cases, decrees

(*a*) Rules of Procedure, r. 24.

(*b*) Rules of Court, Order xxx. See this order as to the mode of proceeding.

(*c*) *Rooke* v. *Lord Kensington*, 2 K. & Jo. 753, 762; *Bristow* v. *Whitmore*, 4 K. & Jo. 743.

(*d*) *Trustees of Birkenhead Docks* v. *Laird*, 4 De G. M. & G. 732, 738.

(*e*) *Gosling* v. *Gosling*, Johns. 265.

(*f*) As to a clause of pre-emption in a parol agreement for a partnership not being within the statute, see *Essex* v. *Essex*, 20 Beav. 442. But see *Caddick* v. *Skidmore*, 2 De G. & Jo. 52.

specific performance of a parol agreement, upon the ground, 1st, of fraud having been the cause of the non-compliance with the requisitions of the Statute: 2ndly, of the parol agreement having been in part performed; or, 3rdly, of its existence being admitted by the defendant (g).

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on ground of fraud. Part performance, or defendant's admission.

1st. If by fraud the defendant has prevented a compliance with the requisitions of the Statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract (h). But it is not fraud in a purchaser to decline to sign the fair copy of an agreement, which he had assented to when in draft, and had promised to sign as soon as it was fair copied (i).

Fraud takes case out of Statute.

2ndly, As to acts of part performance (k) sufficient to take a case out of the Statute of Frauds.—It is, in general, of the essence of such an act, that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract (l). For instance, delivery of possession is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser (m); and acceptance of possession is a sufficient part performance, on the part of the purchaser, to sustain his suit against the

Part performance—what acts sufficient to take case out of Statute;

as, e. g., delivery of possession;

(g) As to the distinction between agreements and declarations of trust, see *Dale* v. *Hamilton*, 2 Ph. 266, 275. See too, *Smith* v. *Matthews*, 3 De G. F. & Jo. 139; 7 Jur. N. S. 378, and cases there cited. "When the Court is called upon to establish or act upon a trust of lands, by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust; but it must also be manifested and proved by writing, signed as required, what that trust is;" per Lord Justice Turner, in *Smith* v. *Matthews*, ubi suprà.

(h) See *Whitchurch* v. *Bevis*, 2 Bro. C. C. 565; and note to *Pym* v. *Blackburn*, 5 Ves. 38, and cases there collected, and *Morse* v. *Merest*, 6 Madd. 26; *Lincoln* v. *Wright*, 4 De G. & Jo. 16.

(i) *Wood* v. *Midgley*, 5 De G. M. & G. 41.

(k) See *Att.-Gen.* v. *Day*, 1 Ves. S. 218, 221; *Taylor* v. *Beech*, ib. 297.

(l) Per V.-C. W., in *Dale* v. *Hamilton*, 5 Ha. 381.

(m) *Pyke* v. *Williams*, 2 Vern. 455; *Lacon* v. *Mertins*, 3 Atk. 1, 4; *Bowers* v. *Cator*, 4 Ves. 91; *Buckmaster* v. *Harrop*, 13 Ves. 456; *Reynolds* v. *Waring*, You. 351, 353.

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vendor (*n*). The fact of the purchaser being, without liability to a charge of trespass, in possession of the vendor's land, is considered as showing unequivocally that some contract has taken place between the litigant parties (*o*); and the Court will then receive parol evidence of the terms of such contract.

retention of possession;

Thus, where there was a parol agreement for a mortgage, and that the mortgagor should continue in the occupation of part of the property, but an absolute conveyance was taken, it was held that the retention of possession by the mortgagor after the execution of the conveyance was a sufficient part performance to exclude the operation of the Statute; and parol evidence was admitted to prove the terms of the contract (*p*). Where the relation of landlord and tenant exists, the mere continuance in possession by the latter cannot *per se* be relied on as a part performance of a parol contract for the purchase of the property (*q*): but the execution by a tenant, who was let into possession, of certain repairs pursuant to a parol agreement for a lease, has been held sufficient (*r*); so, the retention of possession by a tenant after the determination of the original tenancy, may, under special circumstances, amount to part performance (*s*); so, also, if a tenant in possession lay out money on the premises, upon the faith of the parol agreement (*t*), or it is conceived, commit acts which would, (if he were merely tenant,) subject him to the loss of his lease (*u*), or to pro-

(*n*) *Clinan* v. *Cooke*, 1 Sch. & L. 41; *Gregory* v. *Mighell*, 18 Ves. 328; *Morphett* v. *Jones*, 1 Sw. 172; *Surcome* v. *Pinniger*, 3 De G. M. & G. 571.

(*o*) *Per* V.-C. W., 5 Ha. 381; *Wilson* v. *West Hartlepool Ry. Co.*, 34 Beav. 187; 2 De G. Jo. & S. 475; the doctrine of part performance extends to a public company.

(*p*) *Lincoln* v. *Wright*, 4 De G. & Jo. 16.

(*q*) *Wills* v. *Stradling*, 3 Ves. 381: *Morphett* v. *Jones*, 1 Swanst. 181.

(*r*) *Shillibeer* v. *Jarvis*, 8 De G. M. & G. 79; and see *Powell* v. *Lovegrove*, *ib.* 357.

(*s*) *Dowell* v. *Dew*, 1 Y. & C. C. C. 345.

(*t*) *Wills* v. *Stradling*, 3 Ves. 382; *Ex parte Hooper*, 19 Ves. 479; *Lester* v. *Foxcroft*, 1 Coll. P. C. 108; 1 Wh. & T. L. C. 4th edit. p. 768, and cases cited in note; *Mundy* v. *Jolliffe*, 5 Myl. & C. 167; *Sutherland* v. *Briggs*, 1 Ha. 26.

(*u*) See and consider *Parker* v. *Smith*, 1 Coll. 608.

ceedings on the part of the landlord (*x*): so, it has been held, that the mere payment of additional rent entitles the tenant to an answer from the landlord as to the existence of an agreement for a renewed lease, although the Court intimated an opinion against the admissibility of parol evidence in opposition to the answer (*y*). And, in one case, where a landlord verbally agreed with his yearly tenant to grant him a lease at an increased rent, with an option of purchasing the fee, the mere payment of the additional rent was held, after the landlord's death, to be a sufficient part performance to take the case out of the Statute (*z*).

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In one case, it appears to have been doubted by Knight Bruce, L. J., whether a retention of possession by the tenant after a parol agreement, could be such a part performance as to exclude a defence founded on the Statute (*a*): but the later cases have extended the doctrine; and it is now well settled that if the acts relied on are sufficient for the purpose, and are such as can only be referred to the parol agreement, the mere circumstance that the tenant was already in the occupation of the property is not material (*b*). It is, of course, open for the vendor to show that the acts of part performance are properly referable to the pre-existing tenancy.

except where the acts relied on are referable to the pre-existing tenancy.

And where the parties have for many years acted upon the assumption that a contract existed, acts which might not in themselves, and irrespectively of the lapse of time, have been sufficient to take the case out of the Statute, have been held to have that effect (*c*).

But there can be no part performance of an incomplete

What acts are insufficient.

(*x*) See 5 Myl. & C. 177; and *Sutherland* v. *Briggs*, *ubi suprà*.

(*y*) *Wills* v. *Stradling*, 3 Ves. 378, 382.

(*z*) *Nunn* v. *Fabian*, L. R. 1 Ch. Ap. 35. In this case a written receipt was given by the landlord for a quarter's rent at the increased rate; and see *Clarke* v. *Reilly*, 2 I. R. C. L. Exch. 422; *Howe* v. *Hall*, 4 I. R. Eq. 242.

(*a*) *Pain* v. *Coombs*, 1 De G. & Jo. 34, 46.

(*b*) See *Nunn* v. *Fabian*, *ubi suprà*.

(*c*) *Blackford* v. *Kirkpatrick*, 6 Beav. 232.

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contract (*d*); and an act which is merely introductory or ancillary to a contract, or which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not, in general, sufficient to take the case out of the Statute (*e*): *e. g.*, delivery of the abstract, or giving directions for the conveyance, or having the estate surveyed or valued, is insufficient (*f*): so, also, is payment of a sum alleged to be part or even all of the purchase-money (*g*); or procuring, and paying a valuable consideration for, a release by a third party (*h*); or the mere retention of possession by a tenant after the determination of his tenancy but before notice to quit (*i*); or an expenditure by the tenant to which he is liable under the terms of his lease (*k*): so, possession obtained wrongfully by the plaintiff, of course, cannot avail him (*l*).

In one case, it was laid down by Lord Westbury that where the contract is executory in this sense, *viz.*, that the ownership of the property is transferred subject to the payment of the purchase-money by instalments, the payment of each instalment is an act of part performance, and, to the extent of the purchase-money so paid, does, in Equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate (*m*).

(*d*) *Lady Thynne* v. *Earl Glengall*, 2 H. L. C. 131, 158; and see *Parker* v. *Smith*, 1 Coll. 623; but as to amount of consideration, *vide infrà*; and see *Phillips* v. *Edwards*, 33 Beav. 440.

(*e*) 5 Ha. 381; and see *Gunter* v. *Halsey*, Amb. 586; *Lacon* v. *Mertins*, 3 Atk. 4; *Ex parte Hooper*, 19 Ves. 479.

(*f*) *Whaley* v. *Bagnel*, 1 Bro. P. C. 345; *Hole* v. *White*, 1 Bro. C. C. 409 (cited); *Pedding* v. *Wilkes*, 3 Bro. C. C. 400; *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559; *Clerk* v. *Wright*, 1 Atk. 12; *Bawdes* v. *Amhurst*, Pr. C. 402; *Cooke* v. *Tombs*, 2 Anst. 425; *Thomas* v. *Blackman*, 1 Coll. 301; *Phillips* v. *Edwards*, 33 Beav. 440; Sug. 140.

(*g*) *Clinan* v. *Cooke*, 1 Sch. & L. 40; *Watt* v. *Evans*, 4 Y. & C. 579; *Hughes* v. *Morris*, 2 De G. M. & G. 356; and see 5 Ha. 381; *Stroughill* v. *Gulliver*, 2 Jur. N. S. 700, which was the case of a parol agreement in anticipation of marriage.

(*h*) *O'Reilly* v. *Thompson*, 2 Cox, 271.

(*i*) *Wills* v. *Stradling*, 3 Ves. 381; *Brennan* v. *Bolton*, 2 Dru. & W. 349.

(*k*) *Frame* v. *Dawson*, 14 Ves. 386; *Lindsay* v. *Lynch*, 2 Sch. & L. 1.

(*l*) Sug. 151; *Hole* v. *White*, 1 Bro. C. C. 409 (cited).

(*m*) *Rose* v. *Watson*, 10 H. L. Ca. 672.

Change of residence;

Where A. removed his place of business to a house belonging to B., his father-in-law, upon the faith of an alleged parol promise that he should occupy it rent-free for his life, it was held, in a suit to restrain an action of ejectment, that the change of residence was an insufficient consideration to support the parol agreement; and that A. had no lien for money which during the period of his occupation he had expended in ordinary repairs (*n*): but in a very recent case, where the decision just referred to does not appear to have been cited, V.-C. Malins held, under very similar circumstances, that the mere change of residence, and the alteration in the mode of life which resulted from it, were sufficient to support a parol agreement to let the house rent-free (*o*).

marriage.

Marriage is not, for the purposes of specific performance, considered as a part performance of a parol contract, for which it forms the consideration (*p*). Thus, where instructions were given to a solicitor to prepare a settlement of the intending husband's property, but it could not be ready by the time fixed for the marriage, and there was no antenuptial contract, a settlement made shortly after the marriage was held fraudulent and void as against the husband's creditors (*q*). So, where a draft settlement was prepared according to instructions given by the intending husband, but, before it was finally approved, the idea of a settlement was abandoned on his verbal promise that he would forthwith execute a will leaving his wife all her own property, and such a will was executed immediately after the marriage ceremony, but was subsequently revoked, it was held that the execution of the will, which was in itself a mere revocable instrument, was not sufficient to constitute

(*n*) *Millard* v. *Harvey*, 10 Jur. N. S. 1167; M.R.

(*o*) *Coles* v. *Pilkington*, L. R. 19 Eq. 174; and see *Loffus* v. *Maw*, 3 Giff. 592.

(*p*) *Spurgeon* v. *Collier*, 1 Eden, 55; *Taylor* v. *Beech*, 1 Ves. S. 298; *Lassence* v. *Tierney*, 1 Mac. & G. 572; *Goldicutt* v. *Townsend*, 28 Beav. 445; *De Biel* v. *Thompson*, 3 Beav. 469.

(*q*) *Warden* v. *Jones*, 23 Beav. 487; 2 De G. & Jo. 76; in effect overruling *Dundas* v. *Dutens*, 1 Ves. jun. 199.

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part performance (r). On appeal to the House of Lords the question of part performance was not argued; and the decision of Lord Cranworth was affirmed, on the simple ground that there was no sufficient memorandum signed by the party to be charged (s).

But part performance of a parol agreement, independently of the marriage, may take the case out of the Statute.

But where there is a written agreement after, in pursuance of a parol agreement before, marriage, or where, after the marriage, possession of the property is given up, or some other act is done, in pursuance of the parol agreement, which, independently of the marriage, will constitute part performance, the contract may be enforced (t): thus, where one of the contracting parties verbally agrees, as the consideration for the marriage, to settle an estate, and, on the faith of that promise, the other contracting party, or some person acting on his or her behalf, makes a settlement and the marriage is solemnized, the settlement so made is a sufficient act of part performance to take the case out of the Statute (u): so, where a marriage was contracted, and a settlement made by the husband, on the faith of representations by his wife's father, that his daughter upon the decease of her parents would become absolutely entitled to one-third of certain trust funds, the sole surviving child of the marriage was held entitled to have the representations made good, and to have a subsequent appointment by her grandfather, which prevented the devolution of the one-third share, set aside (x).

So, if, in the case of moneys expended by a tenant, the circumstances were such as would, if there were no contract for sale, enable him to recover the amount from the landlord,

(r) *Caton* v. *Caton*, L. R. 1 Ch. Ap. 137, overruling V.-C. S., see observations of V. C. Malins on this case, L. R. 19 Eq. 180.

(s) L. R. 2 E. & Ir. App. 127.

(t) *Surcome* v. *Pinniger*, 3 De G. M. & G. 571; *Barkworth* v. *Young*, 4 Drew. 1. See *Cooper* v. *Wormald*, 27 Beav. 266.

(u) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; *sed quære* whether this case was decided on the Statute of Frauds; see *Mansel* v. *White*, 4 H. L. Ca. 1055.

(x) *Walford* v. *Gray*, 11 Jur. N. S. 106, V.-C. S.; 13 W. R. L. C. 761.

the case would not appear to be different in principle from that of payment of purchase-money. The same remark applies to the case of the payment of additional rent (y); where, however, as we have seen, the decision was, that the landlord, who had pleaded the Statute, should answer.

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Mundy v. Jolliffe.

In the case of *Mundy* v. *Jolliffe* (z), the defendant, in pursuance of a parol agreement for a lease, had laid down a field in pasture, and executed draining and repairs; acts which are referred to by Sir J. Wigram, V.-C. (a), as "certainly equivocal:" the bill was dismissed by Sir L. Shadwell, V.C., but this decision was reversed by Lord Cottenham, C., on appeal. His Lordship, in giving judgment, indicated a willingness rather to extend than to contract (b) the jurisdiction: "Courts of Equity," observed his lordship, "exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting the party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect what the terms of it really were" (c): and when it finds that possession is fairly referable to an express agreement to give a fair rent or consideration, the exact amount of which has not been settled,

(y) *Wills* v. *Stradling*, 3 Ves. 378; and see *Nunn* v. *Fabian*, L. R. 1 Ch. Ap. 35; and *vide suprà*, p. 1025.

(z) 9 Sim. 413; on appeal, 5 Myl. & C. 167.

(a) 5 Ha. 381.

(b) See Sug. 156.

(c) 5 Myl. & C. 177; see *Gregory* v. *Wilson*, 9 Ha. 690; *Pain* v. *Coombs*, 1 De G. & Jo. 34; *Nunn* v. *Fabian*, L. R. 1 Ch. Ap. 35; and see *Ramsden* v. *Dyson*, L. R., E. & Ir. Ap. 129 and Lord Kingsdown's judgment, *ib.* p. 170.

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it will strain its jurisdiction to fix the amount of such rent or consideration (*d*).

An agreement by a municipal corporation to let land upon lease, although not under seal, will be enforced against them, where there have been acts of part performance by the intended lessee on the faith of a resolution to grant the lease (*e*).

As to a parol family arrangement.

Where a father by his will left his real estate to his two sons, but the will, for want of due attestation, could not be admitted to probate, and the elder son, who inherited the estate, told his brother on several occasions that the property should be "not mine, nor thine, but ours," and it was accordingly held by them as tenants in common for nearly twenty years, the Court considered this to be a sufficient proof of a family arrangement, enforceable against the elder brother (*f*).

Verbal notice and retention of possession by tenant, sufficient declaration of option to purchase.

In one case, where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V.-C. Wigram appears to have considered, that his verbal notice of intention to take the new lease, accompanied by retention of possession, was binding upon him (*g*).

Ejectment by landowner restrained on ground of mere acquiescence in expenditure.

And where a colliery proprietor, under the mistaken notion that he had a power of compulsorily purchasing land for the purpose of a railway, wrote to the landowner, and, referring to such supposed power, offered to purchase the land at a fair valuation, and, no reply being given, the railway was made over the land without further communication with him, but with his full knowledge, and then, after a fruitless negotia-

(*d*) See *Gregory* v. *Mighell*, 18 Ves. 328; *Meynell* v. *Surtees*, 1 Jur. N. S. 80, 742; 3 Sm. & G. 101.

(*e*) *Crook* v. *Corporation of Seaford*, L. R. 6 Ch. Ap. 551; L. R. 10 Eq. 678; and as to companies being bound by acts of part performance, see *Wilson* v. *West Hartlepool R. Co.*, 34 Beav. 187; 2 De G. J. & S. 475.

(*f*) *Williams* v. *Williams*, 2 Dr. & S. 378; affirmed L. R. 2 Ch. Ap. 294; see too, *Good* v. *Good*, 33 Beav. 314.

(*g*) *Beaton* v. *Nicholson*, 6 Jur. 620.

tion as to the price to be given for the land, the landowner commenced an ejectment upwards of three years after the railway had been finished; the same learned judge, on motion, restrained the action, upon the colliery proprietor giving judgment in the action, and paying into Court the utmost valuation of the land (h). So, where a canal was made over land with the consent of the freeholder, and compensation was paid to the tenant, but the amount of compensation which the freeholder was to receive remained unsettled, his representatives and parties claiming under him by purchase with notice of the facts, were restrained at the expiration of the tenancy from asserting their legal rights (i). But when the party in possession has acquired a statutory right to purchase and hold the land, there is no longer the same reason as before for straining the jurisdiction of the Court (k).

Case of sale under a power: remainderman not bound.

In the case of a power of sale or leasing the parol contract of a tenant for life, followed by expenditure, would, it is conceived, be insufficient to bind a remainderman who had not acquiesced in such expenditure (l), unless after the death of the tenant for life he lie by and allow the purchaser or lessee to improve the estate (m): for the plaintiff's contention, in cases of part-performance, is, that it is a fraud on a party permitting an expenditure on the faith of a parol agreement, to attempt to take advantage of its not being in writing (n).

Plaintiff, how far bound to

It seems to be clear, upon the modern authorities (o), that

(h) *Powell* v. *Thomas*, 6 Ha. 300; and see *Clavering's case*, cited 5 Ves. 690; *Duke of Devon* v. *Elgin*, 14 Beav. 530; and compare *Ramsden* v. *Dyson*, L. R. 1 Eq. & Ir. Ap. 129, 170; *Bankart* v. *Tennant*, L. R. 10 Eq. 141.

(i) *Duke of Beaufort* v. *Patrick*, 17 Beav. 60.

(k) *Meynell* v. *Surtees*, 1 Jur. N. S. 80, 742; but see *Somersets. Coal C. Co.* v. *Harcourt*, 2 De G. & Jo. 596.

(l) *Blore* v. *Sutton*, 3 Mer. 247; *Lowry* v. *Lord Dufferin*, 1 Ir. Eq. Rep. 281; *Morgan* v. *Milman*, 3 De G. M. & G. 33, *vide suprà*, p. 843.

(m) *Stiles* v. *Cowper*, 3 Atk. 692.

(n) 3 Mer. 246.

(o) See *Allen* v. *Bower*, 3 Bro. C. C. 149; *Clinan* v. *Cooke*, 1 Sch. & L. 38; *Boardman* v. *Mostyn*, 6 Ves. 467, 471; *Morphett* v. *Jones*, 1 Sw. 172; *Price* v. *Assheton*, 1 Y. & C. 82; *Dale* v. *Hamilton*, 5 Ha. 331; *Mundy*

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show precise terms of contract.

the Court, being satisfied of the existence of an agreement, will, if possible, ascertain the real terms. Lord St. Leonards, however, remarks, that "the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract" (*p*); and in a case in Ireland, a reference was refused at the hearing, on the ground that the party setting up the agreement had not produced evidence which, if uncontradicted, would be sufficient to establish its essential terms; the Court holding that a reference should be directed only in cases where the evidence is contradictory (*q*). But it has been held, that where the bill states, as part of the agreement, a stipulation which would operate against the plaintiff, and which created a liability to which he would, in the absence of agreement, have been liable,—(*e. g.*, an agreement by an intended lessee to pay taxes and make necessary repairs (*r*),)—or which has been satisfied, and so rendered immaterial, so far as relates to anything remaining to be done (*s*), the failure to prove such statement is unimportant.

Immaterial terms of agreement, although stated in bill need not be proved;

but it must be shown that the acts of part performance are solely referable to the agreement;

Where a parol agreement is sought to be specifically enforced, on the ground of part performance, it must be distinctly shown what are the terms of the agreement which has been partly performed, and that the acts of part performance are referable to that agreement alone (*t*).

and the material

But, although the Court will endeavour to put a

v. *Jolliffe*, 5 Myl. & C. 167, 177; and see *Crook* v. *Corporation of Seaford*, L. R. 10 Eq. 678; L. R. 6 Ch. Ap. 551; *Laird* v. *the Birkenhead R. Co.* Johns. 500; *Wilson* v. *West Hartlepool R. Co.*, 34 Beav. 187; 2 De G. Jo. & S. 475; Sug. 148.

(*p*) Sug. 155; see *Price* v. *Assheton*, 1 Y. & C. 441.

(*q*) *Savage* v. *Carroll*, 1 Ba. & B. 283, 550, 551; this case, however, was not one between vendor and purchaser; but the validity of the contract was discussed upon the collateral question whether the heir of a purchaser who had died before completion was entitled to have the purchase-money paid out of the personal estate.

(*r*) *Gregory* v. *Mighell*, 18 Ves. 328.

(*s*) *Mundy* v. *Jolliffe*, 5 Myl. & C. 167, 176.

(*t*) Per Lord Romilly, in *Price* v. *Salusbury*, 32 Beav. 446, 459; affirmed by the Lords Justices, *ibid.* 461.

reasonable interpretation upon vague expressions (*u*); and, in construing them, will consider the surrounding circumstances, and the conduct of the parties in their dealings with the subject-matter of the contract (*x*); yet if the final result of all the evidence which can be procured, is, to leave the material terms of the agreement doubtful, it can, of course, make no decree.

terms must ultimately be clearly shown.

Thus, where it remained uncertain whether the purchase-money did or did not include the timber, the Court declined to interfere (*y*); so, where an agreement for a lease did not state the length of the term to be granted (*z*), or the date at which it was to commence (*a*), or at which an increased rent was to become payable (*b*); so, where on a contract for a lease for lives the lives were not named, nor the person who was to name them (*c*); so where the construction of the agreement depended upon the meaning of an "&c." (*d*); so, where the agreement was to take a lease of a house if the drawing-rooms were "handsomely decorated according to the present style" (*e*); so, in the absence of special circumstances, the Court will not enforce specific performance of a contract for the sale of land, which is silent as to the means of access to it, when it is reasonably uncertain whether a permanent right of way can be conferred on the purchaser (*f*).

(*u*) *Sanderson* v. *Cockermouth R. Co.*, 11 Beav. 497; *Richardson* v. *Eyton*, 2 De G. M. & G. 79.

(*x*) See *Oxford* v. *Provand*, L. R. 2 P. C. 135.

(*y*) *Reynolds* v. *Waring*, You. 346; in this case no reference appears to have been asked for by the plaintiff. See *Monro* v. *Taylor*, 8 Ha. 51; affirmed, 3 Mac. & G. 713.

(*z*) *Clinan* v. *Cooke*, 1 Sch. & Lef. 22.

(*a*) *Blore* v. *Sutton*, 3 Mer. 237.

(*b*) *Lord Ormond* v. *Anderson*, 2 Ba. & Be. 363.

(*c*) *Wheeler* v. *D'Esterre*, 2 Dow. 359; but see *Fitzgerald* v. *Vicars*, 2 Dru. & Wal. 298.

(*d*) *Price* v. *Griffith*, 1 De G. M. & G. 80; and see *Tatham* v. *Platt*, 9 Ha. 660; *Stuart* v. *L. & N. W. R. Co.*, 1 De G. M. & G. 721. But see *Haywood* v. *Cope*, 25 Beav. 140; *Parker* v. *Taswell*, 2 De G. & Jo. 559; *Cooper* v. *Hood*, 26 Beav. 293, and *vide suprà*, p. 220.

(*e*) *Taylor* v. *Portington*, 7 De G. M. & G. 328; but see *Samuda* v. *Lawford*, 8 Jur. N. S. 739.

(*f*) *Denne* v. *Light*, 8 Jur. N. S. 627; 8 De G. M. & G. 774.

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Act by defendant, merely to his own prejudice, no part performance; nor does part-performance, as to one lot, affect another lot.

And it appears that, as a general rule, the plaintiff cannot rely upon any act by the defendant which can merely tend to his own prejudice, and not affect the plaintiff; *e. g.*, payment of auction duty by the purchaser (*g*); or the execution and registration by the vendor of the conveyance (*h*). Nor, in the case of a purchase of separate lots under separate parol contracts, does part performance as to one lot set up the agreement as to another lot (*i*).

Sales by auction and in bankruptcy within statute.

We may here remark, that sales by auction (*k*), and in bankruptcy (*l*), are both within the Statute of Frauds.

Admission of agreement by defendant, and statute not insisted on.

3rd. Where the defendant, by his answer, admits the agreement as alleged in the bill, and does not claim the benefit of the Statute, Equity will decree specific performance against himself; or, if he die before decree, against his representatives (*m*). So, if he admit a different agreement from that alleged in the bill, the plaintiff may amend his bill and take the benefit of the admission (*n*); but, in any case, the latter, in relying on the admission, is bound by its terms, and cannot vary them by parol evidence (*o*). So, if the defendant, although admitting the agreement, insist upon the Statute, no decree can be made against him (*p*): but he cannot, after having admitted and submitted to perform the agreement, claim the benefit of the Statute by his answer to the amended bill (*q*); nor can he unite a plea of the Statute with any other defence by answer (*r*). It has been held that the defendant, denying

(*g*) *Buckmaster* v. *Harrop*, 13 Ves. 465; the particular case cannot again arise, the duty having been repealed.

(*h*) *Hawkins* v. *Holmes*, 1 P. Wms. 770.

(*i*) *Buckmaster* v. *Harrop*, 13 Ves. 465, 474.

(*k*) *S. C.*: *Blagden* v. *Bradbear*, 12 Ves. 466.

(*l*) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(*m*) See *Gunter* v. *Halsey*, Amb. 586; *Att.-Gen.* v. *Day*, 1 Ves. 221; Sug. 156; see *Parker* v. *Smith*, 1 Coll. 615; *Ridgway* v. *Wharton*, 3 De G. M. & G. 677, 689; 6 H. L. Ca. 238.

(*n*) *Lindsay* v. *Lynch*, 2 Sch. & L. 9.

(*o*) *Pym* v. *Blackburn*, 3 Ves. 34.

(*p*) *Whitchurch* v. *Bevis*, 2 Bro. C. C. 559; *Blagden* v. *Bradbear*, 12 Ves. 466; see *Moore* v. *Edwards*, 4 Ves. 23; *Cooth* v. *Jackson*, 6 Ves. 37; *Rowe* v. *Teed*, 15 Ves. 375; *Jackson* v. *Oglander*, 2 H. & M. 465.

(*q*) *Spurrier* v. *Fitzgerald*, 6 Ves. 548.

(*r*) *Cooth* v. *Jackson*, 6 Ves. 12.

the agreement, but omitting to claim the benefit of the Statute by his answer, was not entitled to avail himself of it (*s*): but this has been overruled by a later decision (*t*): and where no answer is required the defendant may, it seems, plead the Statute orally at the hearing (*u*). It is now well settled that the defence under the Statute may be raised by demurrer (*x*). In one case, where the bill averred a conveyance to the defendant as trustee for the plaintiff for a merely nominal consideration which had not been paid, and asked for a reconveyance, or, in the alternative, for payment of the consideration money, but there was no allegation that the trust was declared in writing, a demurrer to the bill was overruled (*y*).

Parol variation in favour of defendant.

Where a plaintiff alleges a written agreement with a parol variation in favour of the defendant, and offers to perform the agreement with the variation, the Court will, of course, enforce specific performance although the defendant insist on the Statute (*z*).

Purchaser cannot, in general, enforce specific performance of written contract with parol variation.

The plaintiff, however, as a general rule, if suing on a written contract, is bound by its terms; and cannot, upon the ground of fraud, surprise, or mistake, seek to vary, add to, or explain its contents (*a*): except, perhaps, where the fraud consists in a refusal to accede to a promised variation upon the faith of which the plaintiff entered into a written agreement (*b*); or in a fraudulent preparation or alteration

(*s*) *Skinner* v. *M'Douall*, 2 De G. & S. 265; *Baskett* v. *Cafe*, 4 De G. & S. 388.

(*t*) *Ridgway* v. *Wharton*, 3 De G. M. & G. 677; 6 H. L. Ca. 238.

(*u*) *Lincoln* v. *Wright*, 4 De G. & J. 16; *Snead* v. *Green*, 8 Jur. N. S. 4; but see *Holding* v. *Barton*, 1 Sm. & G. App. xxv.

(*x*) *Wood* v. *Midgley*, 5 De G. M. & G. 41; *Barkworth* v. *Young*, 4 Drew 1, 9; *Rummens* v. *Robins*, 11 Jur. N. S. 631; *Pain* v. *Coombs*, 3 Sm. & G. 449; 1 De G. & Jo. 34.

(*y*) *Davies* v. *Otty*, 12 W. R. 682; affirmed, *ibid.* 896.

(*z*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785; *Vouillon* v. *States*, 2 Jur. N. S. 847.

(*a*) *Marquis of Townshend* v. *Stangroom*, 6 Ves. 328; *Price* v. *Dyer*, 17 Ves. 356; *Clowes* v. *Higginson*, 1 Ves. & B. 524; *Earl of Darnley* v. *London, Chatham and Dover R. Co.*, L. R. 2 E. & Ir. Ap. 43; *Snelling* v. *Thomas*, L. R. 17 Eq. 303.

(*b*) *Pember* v. *Mathers*, 1 Bro. C. C. 52, 54; Sug. 174; but see *Clarke* v. *Grant*, 14 Ves. 519, 525, *et quære*.

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of the agreement so as to make it inconsistent with the real intention of the parties; and with the understanding of the plaintiff at the time he executed it; or where, by mistake, an agreement not expressing the real intention of the parties, is entered into, and the mistake is admitted by the answer, or, not being denied by the answer, is proved by unexceptionable evidence (c). A *subsequent* parol variation cannot be enforced by the plaintiff (d), unless there have been such a part performance of the varied agreement as would support a decree in the case of an original independent agreement (e); or, (it is conceived,) unless the defendant by his answer admit the variation and do not insist on the Statute.

Subsequent parol variation can only be enforced if part performed.

We may here remark that a defendant admitting by his answer that the plaintiff at the date of the contract was *entitled*, cannot at the hearing object that no abstract was delivered (f): nor can he to a vendor's bill claim by way of set-off a balance due to him in respect of antecedent transactions (g).

(c) See note to *Pym* v. *Blackburn*, 3 Ves. 38, and cases as to fraud there cited; Lord Thurlow's judgment in *Lord Irnham* v. *Child*, 1 Bro. C. C. 94; Lord Eldon's remarks, 6 Ves. 339; Sir John Leach's argument as counsel for the defendant, in *Woollam* v. *Hearn*, 7 Ves. 215; 2 Wh. & T. L. C. 404; and the judgment in *Att.-Gen.* v. *Sitwell*, 1 You. & C. 583: As to admitting evidence in explanation of particular expressions, *vide suprà*, p. 964, *et seq.* Parol evidence even of collateral matters is inadmissible; *Rich* v. *Jackson*, 4 Bro. C. C. 514; *Hare* v. *Shearwood*, 1 Ves. J. 246; *Marquis Townshend* v. *Stangroom*, 6 Ves. 328. It seems to be doubtful whether a defendant falsely in his answer denying the agreement can be convicted of perjury; *Rex* v. *Dunston*, Ry. & M. 109: at any rate, his conviction will not entitle the plaintiff to a decree: see *Bartlett* v *Pickersgill*, 4 East, 577, n.; cited 4 Burr. 2255; *suprà*, p. 931.

(d) *Robson* v. *Collins*, 7 Ves. 130, 133; *Nurse* v. *Lord Seymour*, 13 Beav. 254.

(e) See *Jordan* v. *Sawkins*, 1 Ves. J. 402; *Price* v. *Dyer*, 17 Ves. 356; *Van* v. *Corpe*, 3 Myl. & K. 269, 277; and Sug. 164.

(f) *Phipps* v. *Child*, 3 Drew. 709.

(g) *Ibid.*

(8.) *As to grounds of defence negativing plaintiff's right to specific performance except with a variation of the original written agreement;* viz.; *fraud—mistake—misrepresentation—unfulfilled promise—parol variation, &c.*

As to ground of defence, &c.

On the other hand, it is quite competent for the defendant to set up a variation from the written contract: and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the Court will perform the contract, taking care that the subject-matter of this parol agreement or understanding is also carried into effect; so that all parties may have the benefit of what they contracted for (*h*).

Defence negativing plaintiff's right to specific performance except with variation.

The admissibility of parol evidence by way of defence to a bill for specific performance of a written agreement, in its literal unvaried terms, may be conveniently considered with reference to four classes of cases: *viz.*:

1st—Fraud or mistake affecting terms of agreement.

1st. Cases where the defence is, that by fraud, or mistake, the written agreement is, *in terms*, different from that which the defendant supposed it to be, when he executed it: this, if proved, will negative the plaintiff's right to specific performance except with the variation (*i*).

2ndly—Fraud, mistake, or surprise, inducing defendant to enter into agreement misapprehending its effect;

2nd. Cases where the defence is, that by fraud, mistake, or surprise, the defendant executed the written agreement under a reasonable misapprehension as to its effect as between himself and the plaintiff: here, also, the Court will refuse to make a decree according to the literal terms, or strict construction, of the agreement.

(*h*) *Per* Lord Cottenham, Cr. & Ph. 62.

(*i*) See *Joynes* v. *Statham*, 3 Atk. 388; *Woollam* v. *Hearn*, 7 Ves. 211; 2 Wh. & T. L. C. 484; Sug. 157; *Marquis Townshend* v. *Stangroom*, 6 Ves. 328; *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165; *Garrard* v. *Grinling*, 2 Sw. 244; *Lord Gordon* v. *Marquis Hertford*, 2 Madd. 106; *Clinan* v. *Cooke*, 1 Sch. & L. 38, 39; *Humphries* v. *Horne*, 3 Ha. 277; *Wood* v. *Scarth*, 1 Jur. N. S. 1107; 2 K. & Jo. 33; *Wright* v. *Goff*, 2 Jur. N. S. 481; and see *Vouillon* v. *States*, 2 Jur. N. S. 845.

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as w[illegible] terms [illegible]here the agreeme[illegible] of the ambiguous [illegible]nt are [illegible]

Thus, where the terms of the agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce it (*k*); and this, even where th[illegible]he defendant himself was the author of the ambiguity, and the pl[illegible]laintiff certainly supposed himself to be buying all he claimed [illegible] (*l*). So, where the defendant, by his answer, alleged that he ma[illegible] his offer, and signed a contract for the purchase of an undivided moie[illegible] of an estate, under the erroneous belief that the rental stated in the par[illegible]ticular was that of the moiety, and not of the whole estate, and th[illegible] wording of the particular justified a doubt as to its meaning, the Court refused to enforce specific performance (*m*): so, where the defendant assumed that his contract for the purchase of a dwelling-house included an adjoining yard, and the contract was so framed as to leave it doubtful whether it was included or not (*n*). So, where the defendant was misled by the sale plan as to the boundaries of the purchased property (*o*). So, where the defendant made a mistake in calculating the purchase-money which he was willing to take, and offered to sell the estate for 1,250*l.* instead of 2,250*l.*, as he had intended (*p*). So, where the written contract which the plaintiff sought to enforce was silent as to any restrictive conditions, extrinsic evidence was

(*k*) *Calverley* v. *Williams*, 1 Ves. jun. 210; *Higginson* v. *Clowes*, 15 Ves. 516; *Clowes* v. *Higginson*, 1 Ves. & B. 524; V.-C. Wigram's judgment in *Manser* v. *Back*, 6 Ha. 447; and see *Alvanley* v. *Kinnaird*, 2 Mac. & G. 8; *Wood* v. *Scarth*, *ubi suprà*. In *Jenkinson* v. *Pepys*, cited 6 Ves. 330, the evidence appears, in fact, to have been offered on behalf of the plaintiff instead of the defendant: see 15 Ves. 522, and 6 Ha. 447.

(*l*) *Neap* v. *Abbott*, 1 C. P. Coop. 333; *Manser* v. *Back*, *ubi suprà*. As to alteration of an agreement, *vide suprà*, p. 236, and cases cited; see also a case of *Twentyman* v. *Barnes*, 12 Jur. 743, V.-C. K. B., where a plaintiff alleged that the agreement had been altered by chemical agency, and moved that the paper might be subjected to chemical tests; but the Court refused the application.

(*m*) *Swaisland* v. *Dearsley*, 29 Beav. 430.

(*n*) *Moxey* v. *Bigwood*, 8 Jur. N. S. 803; reversing V.-C. S.; and see *S. C.*, H. L. 10 Jur. N. S. 597.

(*o*) *Denny* v. *Hancock*, L. R. 6 Ch. Ap. 1.

(*p*) *Webster* v. *Cecil*, 30 Beav. 62; in this case the mistake was clearly proved by a written calculation made before the sale.

admitted to prove a prior restricted parol agreement, and specific performance of the open contract was refused (*q*).

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but mere suspicion of fraud is not a sufficient ground for relief;

The principle on which the Court in such cases withholds relief from the plaintiff is, that it is against conscience for a man to take advantage of the plain mistake of another; or, at least, that a Court of Equity will not assist him in doing so: but the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, have been held insufficient to negative the right to specific performance,—no fraud being shown (*r*): nor will the Court allow a mistake in law (*s*), or as to the legal effect of the language of the contract (*t*), to be set up as a ground for resisting specific performance (*u*). So, where the defendant speculates upon facts, which turn out contrary to his expectation, he cannot rely on his mistaken view; and his own personal mistake as to the use which he might make of the property is unimportant (*x*).

and mistake, if relied on, must be clearly proved.

Mistake, if relied on, must be clearly proved (*y*), and parol evidence is admissible for the purpose. The acts of the parties subsequent to the contract may, in some cases, be material as evidence of mistake (*z*).

3dly—Misrepresentation, or unfulfilled promise, inducing

3rd. Cases where the defendant has obtained the like protection, when he has executed the agreement, knowing its terms and understanding its effect, but relying upon some

(*q*) *Barnard* v. *Cave*, 26 Beav. 253.

(*r*) *Lightfoot* v. *Heron*, 3 Y. & C. 586.

(*s*) "It is said, '*Ignorantia juris haud excusat*;' but in that maxim the word 'jus' is used in the sense of denoting general law, the ordinary law of the country. But when the word 'jus' is used in the sense of denoting a private right, that maxim has no application." *Per* Lord Westbury, in *Cooper* v. *Phibbs*, L. R. 2 E. & Ir. Ap. 149, 170.

(*t*) *Powell* v. *Smith*, L. R. 14 Eq. 85.

(*u*) *Marshall* v. *Collett*, 1 Y. & C. Ex. 232, 238; *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*x*) *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*y*) *Clay* v. *Rufford*, 14 Jur. 803 V.-C. W.; and see *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1; *Earl of Darnley* v. *London, Chatham & Dover R. Co.*, L. R. 2 E. & Ir. Ap. 43.

(*z*) *Monro* v. *Taylor*, 8 Ha. 56.

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defendant to enter into agreement knowing its terms and effect.

misrepresentation (*a*) by the plaintiff, or upon some stipulation upon his part, which goes to vary the written agreement, but which he refuses to fulfil: *e. g.*, a parol promise to vary the terms of the written agreement has been admitted as a defence to a bill seeking its specific performance (*b*). So, too, where there was a parol promise that a vendor should have a lease of the property which he had in writing agreed to sell (*c*): and the same decision has been come to in the case of a parol promise by the auctioneer, on behalf of the vendor, to allow compensation for a deficiency in quantity: the right to which was in effect negatived by the particulars (*d*). So, where the vendor refused to perform his agent's engagement, that improvements should be executed on adjoining property (*e*). But if the plaintiff offer to perform the agreement with—if the defendant so desire—the parol variation or addition, this is sufficient; and the defendant cannot set up the want of a perfect written contract (*f*).

But the non-execution by the vendor of a parol contract, which, although cotemporaneous with the written contract, and relating to the same subject matter, has been treated by the purchaser himself as a distinct contract—*e.g.*, a parol agreement on the sale of a flooded mine to pump it dry (*g*)—is no defence to the vendor's suit for specific performance of the written contract.

So, where A. agreed to purchase Black Acre of B., and B. by the same instrument agreed to purchase White Acre of A., and no title could be shown to Black Acre, it was held

(*a*) See *Buxton* v. *Lister*, 3 Atk. 386; 7 Ves. 219; *Lovell* v. *Hicks*, 2 Y. & C. 46; *suprà*, Ch. III. p. 91, *et seq.*, and 134, *et seq.*; *Harris* v. *Kemble*, 5 Bli. N. S. 730, 754.

(*b*) *Clarke* v. *Grant*, 14 Ves. 519; *Mickletkwaite* v. *Nightingale*, 12 Jur. 638, R.; and see *Hammersley* v. *De Biel*, 12 Cl. & F. 45, 88.

(*c*) *Vouillon* v. *States*, 2 Jur. N. S. 845; see p. 847

(*d*) *Winch* v. *Winchester*, 1 Ves. & B. 375, 378; and see Lord St. Leonards' remarks, V. & P. 161, 162, upon Sir Thomas Plumer's remarks in *Clowes* v. *Higginson*, 1 Ves. & B. 526.

(*e*) *Myers* v. *Watson*, 1 Sim. N. R. 523; see 529; and see *Rose* v. *Watson*, 10 H. L. Ca. 672.

(*f*) *Martin* v. *Pycroft*, 2 De G. M. & G. 785.

(*g*) *Phipps* v. *Child*, 3 Drew. 709.

that, in a suit by A. for specific performance of the agreement for the sale of White Acre, B. could not, as a defence, show that the performance of one agreement was intended to be conditional on the performance of the other; and that the intention was to effect an exchange, and not independent sales. Lord Brougham, C., in affirming the judgment of Sir J. Leach, observed, that "parol evidence of matter collateral to the agreement might be received; but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract" (*h*). Upon which Lord St. Leonards observes that the evidence was inadmissible, "not because it was not to enforce a collateral stipulation; but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, *viz.*, for an exchange between the parties" (*i*).

Parol addition to written agreement, when inadmissible as defence.

The meaning of the above extract from the judgment in *Croome* v. *Lediard*, is, perhaps, not very obvious. If meant to intimate that the non-fulfilment of a stipulation upon a point collateral to the written agreement, and not inconsistent with such agreement, nor shown to have formed any special inducement to its execution, is a good defence in Equity, the *dictum* seems of questionable authority; it having been held that the defendant cannot set up an additional parol stipulation (*e.g.*, as to the time for delivery of possession), which was agreed upon by the parties at the time of their signing the written contract (*k*).

Remarks upon cases.

The distinction in principle between such cases would seem to be this. In the one case, the object of the defence is, not to invalidate or vary the written agreement, except so far as such effect may be incidentally produced by proving a parol agreement relating to the same subject-matter; and this is contrary to the statute. In the other case, the object of the defence is, to directly attack the written agreement itself, by

(*h*) *Croome* v. *Lediard*, 2 Myl. & K. 251, see 260; and see *Lloyd* v. *Lloyd*, 2 Myl. & C. 192.

(*i*) Sug. 163.

(*k*) *Omerod* v. *Hardman*, 5 Ves. 722; 730; and see Sug. 163, *et seq.*

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showing that it was executed under mistake, or on the faith of a misrepresentation by the other party, or of a promise made by him, and which, from his refusal to fulfil it, must be taken to have been originally fraudulent. And where the collateral parol agreement is inconsistent with the written contract, the conclusion would seem to be almost inevitable, that the latter was executed by the party favoured by the parol agreement, either under a mistake as to the contents of the written contract, or under a reliance on the good faith of the other party in performing the parol variation. And the fact of the point being provided for by the written contract, would seem to show, that the parties deemed it important: whereas the contrary may be reasonably presumed of a parol stipulation of a point which is in no way provided for by the written contract (*l*).

Stipulation omitted by consent, no defence;

But where a stipulation is omitted from the written agreement, upon the supposition that it is illegal (*m*); or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted (*n*), Equity will hold the omission binding.

nor a breach by the plaintiff of an independent contract or stipulation.

Nor is a breach by the plaintiff of an independent agreement, or (which is the same thing) of some independent stipulation in the agreement, any defence to a suit for specific performance. Thus, where A., in consideration of B's building a house, agreed to grant him a lease, and in case of any breach the agreement was to be void, and A. was to have the right to re-enter, and by the same instrument A. agreed that B. should have the option of purchasing the fee at a stipulated price within a specified period, it was held that a breach by B. of provisions as to the insurance of the property was no defence to a suit by B. to enforce his right of pre-emption (*o*).

(*l*) And see and consider *Phipps* v. *Child*, *ubi suprà*; *Vouillon* v. *States*, 2 Jur. N. S. 845.

(*m*) *Lord Irnham* v. *Child*, 1 Bro. C. C. 92; see 6 Ves. 332; Sug. 173.

(*n*) See *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 350; *Jackson* v. *Cator*, 5 Ves. 688; *Rich* v. *Jackson*, 4 Bro. C. C. 514, 518.

(*o*) *Green* v. *Low*, 2 Jur. N. S. 848; 22 Beav. 625; see too *Phipps* v. *Child*, *ubi suprà*.

4th. Cases where the written agreement is varied by parol subsequently to its execution: in which cases the variation, to be available as a defence, must be accompanied by such a part-performance as would enable the Court to enforce it if it were an original independent agreement (*p*): subject, nevertheless, to the doctrine of Equity which allows parties, by their acts, to vary the original agreement in respect of matters relating to title and the time for completion (*q*).

4th—Subsequent parol variation, part performed.

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(9.) *As to grounds of defence negativing* in toto *plaintiff's right to specific performance; viz., personal incapacity;—nature of contract, or fraud, &c., &c., attending its execution;—matters relating to the estate,—title—or consideration;—plaintiff's conduct, &c., after contract;—election of other remedy.*

As to grounds of defence, &c.

We may next consider those grounds of defence which, assuming the existence of a *primâ facie* valid agreement, go to negative *in toto* the right to specific performance: and these may, perhaps, be conveniently considered under the several heads of, 1st, matters relating to the personal capacity of the parties to contract; 2nd, matters relating to the nature of the agreement, or to the circumstances under which it was entered into; 3rd, matters relating to the estate contracted for; 4th, matters relating to the title thereto; 5th, matters relating to the consideration; and 6th, matters relating to the conduct of the plaintiff subsequently to the date of the agreement.

Defences negativing *in toto* plaintiff's right to specific performance.

As to the 1st of the above heads.—Personal incapacity on the part of the defendant to enter into the contract (*r*) is, of course, a sufficient defence to a suit for specific performance; unless, having acquired or recovered his contracting capacity, he has confirmed or adopted the agreement. We may here remark, that although intoxica-

1st—personal incapacity to contract—on part of defendant. Intoxication.

(*p*) See *Legal* v. *Miller*, 2 Ves. 299; *Price* v. *Dyer*, 17 Ves. 356, 364; *Robinson* v. *Page*, 3 Russ. 128; Sug. 165.

(*q*) Sug. 165.

(*r*) As to which *vide suprà*, Ch. 1.

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tion, if excessive, amounts to a temporary deprivation of reason (*s*), and is a good defence although the party may not have been drawn in to drink by the plaintiff (*t*), yet it has been held that the mere fact of the defendant having partaken freely of liquor at the time of entering into the contract, is not, in the absence of fraud, or of evidence that he was without the full understanding and knowledge of what he was doing, a reason for refusing specific performance (*u*): especially as against a person who, with notice of the prior contract, has procured a conveyance of the property from the vendor (*x*).

Personal incapacity on part of plaintiff, how far defence.

Personal incapacity on the part of the plaintiff at the time of the contract, cannot, it is conceived, be set up as a defence to a suit for specific performance, if the plaintiff has recovered his capacity at the time of filing the bill (*y*); but the continuance of incapacity, at the time of the bill being filed, would appear to be a good defence (*z*): and at any time during its continuance, the contract, it is conceived, may be put an end to by due notice from the party bound (*a*); except where the incapacity consists in infancy, in which case the other party appears to have no power to rescind the contract (*b*); but the infant cannot, while an infant, enforce it (*c*).

A contract by husband and wife for the sale of the wife's estate, may also, perhaps, be considered an exceptional case; that is, if the purchaser, at the date of the contract, be aware

(*s*) See *Cooke* v. *Clayworth*, 18 Ves. 12, 16; *Cragg* v. *Holme*, *ib.* 14, n.; *Say* v. *Barwick*, 1 Ves. & B. 195; *Nagle* v. *Baylor*, 3 Dru. & W. 60.

(*t*) *Malins* v. *Freeman*, 2 Ke., see p. 34.

(*u*) *Lightfoot* v. *Heron*, 3 Y. & C. 586.

(*x*) *Shaw* v. *Thackray*, 1 Sm. & C. 537.

(*y*) *Clayton* v. *Ashdown*, 9 Vin. Abr. 393, 394; and see cases cited, *infrà*, as to mutuality.

(*z*) *Flight* v. *Bolland*, 4 Russ. 298.

(*a*) See and consider *Martin* v. *Mitchell*, 2 Jac. & W. 428.

(*b*) See Chambers on Infancy, 442; *Shannon* v. *Bradstreet*, 1 Sch. & L. 58; cited in *Flight* v. *Bolland*, 4 Russ. 300; *Smith* v. *Bowen*, 1 Mod. 25.

(*c*) *Flight* v. *Bolland*, 4 Russ. 298. See as to the transfer of shares to an infant, *Capper's case*, L. R. 3 Ch. Ap. 458; *Curtis's case*, L. R. 6 Eq. 455; *Hart's case*, *ib.* 512.

that the property belongs to the wife (d). A married woman may, it seems, enforce her contract for purchase, provided that her separate estate is sufficient to discharge her liabilities under it (e); and she may, of course, enforce a contract for the sale of property settled to her separate use, but her husband will be a necessary party to the suit. An agreement for purchase, entered into in the names of husband and wife enures for the benefit of the wife surviving (f).

2nd—Matters relating to contract, &c.:—illegality.

As to the 2nd of the above heads.—Where the contract has been entered into for an illegal purpose, whether the same be expressly prohibited or be merely the subject of a statutory penalty, Equity will refuse to enforce it (g): but if the agreement is not positively illegal, the Court will not refuse specific performance, merely because it "savours of illegality" (h); and if a legal agreement be intended in all events to be executed according to its terms, it will not necessarily be avoided by a collateral parol stipulation for something not *malum in se* but merely prohibited (i): so, too, a distinction is drawn between enforcing an illegal contract, and asserting a title to money which has arisen from it. For example, where A. and B. fraudulently registered a ship in the United States, and their subsequent employment of her, so registered, was a fraud upon the English Navigation Laws, it was held that A. might nevertheless maintain a suit against B. for an account and payment of

(d) 2 Y. & C. C. C. 62.

(e) *Dowling* v. *Maguire*, Ll. & G. t. Pl. 1, c. 19, *suprà*, p. 1003.

(f) *Drew* v. *Martin*, 2 H. & M. 130; 10 Jur. N. S. 356.

(g) See *Thomson* v. *Thomson*, 7 Ves. 470; *Knowles* v. *Haughton*, 11 Ves. 168; *De Begnis* v. *Armistead*, 10 Bing. 107; *Ewing* v. *Osbaldiston*, 2 Myl. & C. 53, 85: *Gas Light Co.* v. *Turner*, 8 Sco. 609; and see *Tomlinson* v. *Manchester and Birmingham R. Co.*, 2 Rail. Ca. 104; *Ritchie* v. *Smith*, 6 C. B. 462; *Great Northern R. Co.* v. *Eastern C. R. Co.*, 9 Ha. 306, 312; *London and Brighton R. Co.* v. *L. & S. W. R. Co.*, 4 De G. & Jo. 389; *Shrewsbury, &c., R. Co.* v. *London and N. W. R. Co.*, 4 De G. M. & G. 115; 6 H. L. Ca. 112; but the defence is not favoured in Equity: *S. C.*, 16 Beav. 451; and see *Williams* v. *Bayley*, L. R. 1 E. & Ir. Ap. 200, where an equitable mortgage given by A. as an inducement to forbear criminal proceedings against his son, was ordered to be delivered up to be cancelled.

(h) *Aubin* v. *Holt*, 2 K. & Jo. 66, 70.

(i) See *Carolan* v. *Brabazon*, 3 J. & L. 200.

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his share of the *realized* profits of the speculation (*k*). It would seem that an agent for purchase cannot, as against his principal, set up the illegality of the contract (*l*).

Interference with the rights of a third party.

So, also, if the contract be in contravention of the rights of a third party (*m*), Equity will refuse to interfere; as where it derogates from a previous voluntary settlement by the plaintiff vendor (*n*); but specific performance will be enforced, at the suit of the purchaser, against the voluntary settlor (*o*).

Inability of the Court to execute the contract.

So, also, if the contract be one which the Court cannot execute in all its material terms (*p*): so, where there are mutual rights incapable of being enforced by an immediate decree (*q*): so, where the consideration for the contract is the execution of works which the Court cannot superintend (*r*): so, where it involves a contract for personal services

(*k*) *Sharp* v. *Taylor*, 2 Ph. 801; and see *Butt* v. *Monteaux*, 1 K. & Jo. 98, 115; *Sheppard* v. *Oxenford*, *ib.* 491.

(*l*) *Mullock* v. *Jenkins*, 14 Beav. 628. As to champerty, *vide suprà*, p. 239, *et seq.* As to an agreement to give a qualification to sit in Parliament, see *Callaghan* v. *Callaghan*, 8 Cl. & F. 374; *Harris* v. *Amery*, L. R. 1 C. P. 148; and see *May* v. *May*, 33 Beav. 81; where a conveyance by a father to his son in order to qualify him as a voter was upheld. As to the Mortmain Act, see *Att.-Gen.* v. *Wilson*, 2 Ke. 680. As to the Ship Registry Acts, see *Hughes* v. *Morris*, 2 De G. M. & G., 349; *M'Calmont* v. *Rankin*, 2 De G. M. & G. 403; *Armstrong* v. *Armstrong*, 3 Eq. R. 973; *Duncan* v. *Tindall*, 13 C. B. 258; *Parr* v. *Applebee*, 7 De G. M. & G. 585; *European, &c. Mail Co.* v. *Royal Mail, &c., Co.*, 4 K. & Jo. 676.

(*m*) See *Harnett* v. *Yielding*, 2 Sch. & L. 549, 554; and see and consider *Peacock* v. *Penson*, 11 Beav. 355.

(*n*) *Smith* v. *Garland*, 2 Mer. 123; *Johnson* v. *Legard*, Turn. & R. 281; *Campbell* v. *Ingilby*, 1 De G. & Jo. 393.

(*o*) *Buckle* v. *Mitchell*, 18 Ves. 101; *Daking* v. *Whimper*, 26 Beav. 568; and *vide suprà*.

(*p*) *Gervais* v. *Edwards*, 2 Dru. & W. 80; *Counter* v. *Macpherson*, 5 Moo. P. C. 83; *Downs* v. *Collins*, 6 Ha. 437; *Ford* v. *Stuart*, 15 Beav. 493; *Williamson* v. *Wootten*, 3 Dre. 210; *Paris Chocolate Co.* v. *Crystal Palace Co.*, 1 Jur. N. S. 720; 3 Sm. & G. 119; and see *Dietrechsen* v. *Cabburn*, and *Hills* v. *Croll*, 2 Ph. 52 and 60; *Waring* v. *Manchester, &c. R. Co.*, 7 Ha. 492; *Hope* v. *Hope*, 22 Beav. 351; *S. Wales R. Co.* v. *Wythes*, 5 De G. M. & G. 880; *Vansittart* v. *Vansittart*, 4 K. & Jo. 62.

(*q*) *Blackett* v. *Bates*, L. R. 1 Ch. Ap. 117, reversing V.-C. W. 2 H. & M. 270, 610; *Gervais* v. *Edwards*, 2 Dru. & W. 80; *Hills* v. *Croll*, 2 Ph. 60; *Firth* v. *Ridley*, 33 Beav. 516.

(*r*) See *Peto* v. *Brighton, Uckfield, &c. R. Co.*, 1 H. & M. 468; and as to builders' contracts, *vide suprà*, p. 989.

of an uncertain duration (*s*); as *e.g.*, where it was one of the terms of an agreement for the lease of a coal-wharf, that the lessor should act as the lessees' agent in carrying on the business (*t*); so, an agreement either to borrow or to lend a sum of money upon mortgage cannot be specifically enforced (*u*).

Impolicy.

So, where the enforcement of the contract would be against public policy; as where it originated in the improper disclosure of evidence taken in a Chancery suit, the Court will not interfere (*v*); so, if its completion would amount to a breach of trust (*x*); even by reason of any stipulation collateral to the mere agreement for sale; as where it was agreed that the purchaser should out of the purchase-money retain a debt due to him from the selling trustee (*y*): so, where trustees concurred with other fiduciary vendors in a sale of three several properties for an entire sum, which they agreed to apportion among themselves, specific performance against the purchaser was refused (*z*).

Breach of trust.

Agreements for separation of husband and wife.

An agreement between husband and wife, providing for their future separation, is contrary to public policy, and cannot be enforced (*a*); but if entered into after the separation has taken place, or on the eve and in contemplation of

(*s*) *Firth* v. *Ridley*, 33 Beav. 516; *Sykes* v. *Dixon*, 9 Ad. & E. 693.

(*t*) *Ogden* v. *Fossick*, 9 Jur. N. S. 288; 32 L. J. Ch. 73.

(*u*) *Rogers* v. *Challis*, 27 Beav. 175; 6 Jur. N. S. 334; *Sichel* v. *Mosenthal*, 8 Jur. N. S. 275; 30 Beav. 371.

(*v*) *Cooth* v. *Jackson*, 6 Ves. 12, 30.

(*x*) *Mortlock* v. *Buller*, 10 Ves. 292, 313; *Ord* v. *Noel*, 5 Madd. 438; *Bridger* v. *Rice*, 1 Jac. & W. 74; *Turner* v. *Harvey*, Jac. 178; *Wood* v. *Richardson*, 4 Beav. 174; *Baylies* v. *Baylies*, 1 Coll. 546; *Bellringer* v. *Blagrave*, 1 De G. & S. 66; *White* v. *Cuddon*, 8 Ch. & F. 766; *Sneesby* v. *Thorne*, 11 Jur. N. S. 536, 1058; 7 De G. M. & G. 399; *Maw* v. *Topham*, 19 Beav. 576; *Shrewsbury, &c. R. Co.* v. *London and N. W. R. Co.*, 4 De G. M. & G. 115; *Dance* v. *Goldingham*, L. R. 8 Ch. Ap. 902, where trustees were selling under depreciatory conditions. We have seen that an agreement giving A. a right of pre-emption over B.'s estate, in consideration of A. not opposing B. on a sale by auction of other property, is not illegal: *Galton* v. *Emuss*, 1 Coll. 243.

(*y*) *Thompson* v. *Blackstone*, 6 Beav. 470.

(*z*) *Rede* v. *Oakes*, 10 Jur. N. S. 1246, reversing 32 Beav. 555. See as to several mortgagees of the same estate concurring in a sale, *McCarogher* v. *Whieldon*, 34 Beav. 107.

(*a*) *Westmeath* v. *Westmeath*, 1 Dow. & C. 519; *H.* v. *W.*, 3 K. & Jo. 382.

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an intended separation, it may be upheld. Where the agreement is between the husband and a trustee for the wife, and is supported by a good consideration, as, *e.g.*, an indemnity by the trustee against the wife's debts, it can be specifically enforced (*b*); and the agreement of either party not to sue for a restitution of conjugal rights, will be enforced by injunction.

In a late case an agreement entered into between A. and B. his father-in-law upon the occasion of a separation between A. and his wife, whereby A. undertook to execute a formal deed of separation and to secure an annuity for the maintenance of his wife and child, was decreed to be specifically enforced, notwithstanding the absence of any indemnity to the husband against his legal liabilities; upon the ground that the agreement had been acted on by B., who had, at his own expense, maintained his daughter and her child upon the faith of it (*c*).

Improvident contract by agent.

If an agreement be entered into by an agent, the omission of all usual and proper stipulations in favour of his principal (*d*) may be a reason for refusing specific performance: although, as a general rule, the Court will not decline to enforce a contract on the mere ground of its improvidence (*e*).

Agreement for a partnership.

So, although the Court will not, as a general rule, decree specific performance of an agreement to enter into a partnership (*f*), or to contribute a share of partnership capital (*g*), yet where the parties have agreed to execute a formal instru-

(*b*) *Wilson* v. *Wilson*, 1 H. L. Ca. 538; *Hunt* v. *Hunt*, 10 W. R. 215, reversing M. R. 31 Beav. 89; and see *Walrond* v. *Walrond*, Joh. 18; *Williams* v. *Baily*, L. R. 2 Eq. 731.

(*c*) *Gibbs* v. *Harding*, L. R. 8 Eq. 490; affirmed L. R. 5 Ch. Ap. 336.

(*d*) *Helsham* v. *Langley*, 1 Y. & C. C. C. 175. See *White* v. *Cuddon*, 8 Cl. & F. 788, 791; and *Dawson* v. *Brinckman*, 3 De G. & S. 386; as to the authority of an agent to enter into a contract for sale, see *Hamer* v. *Sharp*, L. R. 19 Eq. 108.

(*e*) *Sullivan* v. *Jacob*, 1 Moll. 472, 477.

(*f*) *Sheffield Gas, &c. Co.* v. *Harrison*, 17 Beav. 294; and see *Maxwell* v. *Port Tenant Co.*, 24 Beav. 495; and Lindley, p. 947.

(*g*) *Sichel* v. *Mosenthal*, 30 Beav. 371; 8 Jur. N. S. 275.

ment, which, if executed, will alter their position at law, and enable them to assert a legal right, the execution of the formal instrument may be decreed, notwithstanding that the partnership thus created may be at once dissolved (h); and the circumstance that the deed contains unenforceable provisions does not seem to be material (i).

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And the Court will restrain the breach of a negative clause in a contract, although it cannot specifically enforce the entire contract (k); because if the plaintiff at any time fail to perform his obligations, the injunction may be at once dissolved (l): and where, if an injunction were not granted, the damages would be incapable of estimation, the Court may, it seems, restrain the breach of a positive engagement, even although the entire contract is not enforceable in Equity (m).

In one case, where A., a brewer, sold a freehold plot to trustees of a building society, who covenanted that A., his heirs and assigns, should have the exclusive right of supplying beer to any public-house to be erected on the land, but there was no covenant on the part of A. to supply the beer, and B., having notice of the covenant, erected a public-house on part of the land purchased from the trustees, which he supplied with his own beer, it was held that the covenant was not void, either for uncertainty, or want of mutuality, or as being in unreasonable restraint of trade, or as creating a perpetuity; and that, although positive in terms, it was in substance a negative covenant, the breach of which might be restrained in Equity (n).

So, Equity has refused to enforce contracts on the mere Hardship.

(h) *Buxton* v. *Lister*, 3 Atk. 385; *Stocker* v. *Wedderburn*, 3 K. & Jo. 403.

(i) *Stocker* v. *Wedderburn*, *ubi suprà*

(k) *Great Northern R. Co.* v. *Manchester, &c. R. Co.*, 5 De G. & S. 138; *Lumley* v. *Wagner*, 1 De G. M. & G. 604; and see Kerr on Injunctions, pp. 528, 529, and cases there cited; and see and compare *Merchant's Trading Company* v. *Banner*, L. R. 12 Eq. 18.

(l) See *Stocker* v. *Wedderburn*, 3 K. & Jo. 393, 405.

(m) *Holmes* v. *E. C. R. Co.*, 3 K. & Jo. 675, 680.

(n) *Catt* v. *Tourle*, L. R. 4 Ch. Ap. 654.

ground of their hardship as against the defendants: as where one-half the purchase-money would, under a clause of forfeiture contained in the will of a prior owner, have gone to a third party (o); or, as where the contract provided that a road should be made by the vendor over property retained by him, and it appeared that the making of the road would risk the forfeiture of the lease of part of the estate (p). But before the validity of such a defence is admitted, the Court requires to be satisfied that forfeiture will be the necessary result of enforcing the contract, and also takes into consideration who is responsible for the forfeiture (q): for example, it will not permit a defendant to put himself in such a position as that his performance of the agreement shall create a forfeiture, and then to turn round and say that the plaintiff shall not have specific performance of the agreement, because the defendant has, by his own act, enabled the landlord to enter, upon the agreement being performed (r). So, it has been held, that a mortgagor, contracting to grant a lease should not be compelled to pay off the mortgage in order to enable him to complete the contract (s). So, where a mortgagee, after foreclosure, contracted to sell at a profit, and inadvertently contracted in the character of a mortgagee with a power of sale, the Court refused to compel him to exercise the power, and so run the risk of being held accountable for the purchase-money as mortgagee instead of absolute owner (t); and where there was a *mutual* understanding, but no definite agreement between the mortgagee and intending lessee that the agreement for a lease should be approved by the mortgagor, and he declined to concur, the Court refused to enforce the agreement against the mortgagee, or to hold him liable in damages (u). So, it is

(o) *Faine* v. *Brown*, cited 2 Ves. 307.

(p) *Peacock* v. *Penson*, 11 Beav. 355; and see *Helling* v. *Lumley*, 3 De G. & Jo. 493.

(q) *Helling* v. *Lumley*, 3 De G. & Jo. 493, and see p. 498.

(r) *Per* Turner, L. J., in *Helling* v. *Lumley*, *ubi suprà*, p. 499.

(s) *Costigan* v. *Hastler*, 2 Sch. & L. 160. But damages may in such a case be awarded under Lord Cairns' Act, see *Howe* v. *Hunt*, 31 Beav. 420; and *vide suprà*.

(t) *Watson* v. *Marston*, 4 De G. M. & G. 230.

(u) *Franklinski* v. *Ball*, 33 Beav. 560.

conceived, specific performance would be refused against a mortgagee with no power of sale, who enters into the contract in the mistaken belief that his mortgagor will concur.

So, where a tenant for life, who, upon the settlement by him of lands of equal value, would have been absolutely entitled to the settled estates, contracted to sell them, the Court would not order him to procure and settle other lands, and so acquire a title (*x*); so, where the vendor entered into the contract in the belief that he was the absolute owner, and it subsequently turned out that he had only a power of sale and exchange, and was bound to reinvest the purchase-money, specific performance was refused (*y*).

Breach of trust where a defence on ground of hardship.

So, where the completion of the contract would involve a breach of trust, the Court will, partly, as we have seen (*z*), on the ground of the impolicy, or quasi-illegality of the transaction, and partly on the ground of hardship, decline to interfere. Thus, where a sale by trustees under a power was so disadvantageous as to be a breach of trust, the Court refused to enforce the contract (*a*): so, where the trustees of an estate joined, expressly in that capacity, with the beneficial owners in a contract for sale, and all agreed to exonerate the estate from any incumbrances which might affect it, the Court refused to enforce this agreement against the trustees, when it seemed probable that the incumbrances might, and perhaps materially, exceed the amount of purchase-money (*b*): and the validity of this defence is not confined to cases where an express trust would be violated if the contract were enforced, but applies to every case where its enforcement would involve a breach of confidence (*c*).

(*x*) *Howell* v. *George*, 1 Madd. 1; and see *Southwell* v. *Nicholas*, cited p. 9, n.

(*y*) *Hood* v. *Oglander*, 11 Jur. N. S. 498; 34 Beav. 513, 519; *sed quære.*

(*z*) *Vide suprà*, p. 1047.

(*a*) *Mortlock* v. *Buller*, 10 Ves. 292, 313; and see other cases cited in note (*x*), *suprà*, p. 1047.

(*b*) *Wedgwood* v. *Adams*, 6 Beav. 600; 8 Beav. 103; and see as to hardship, *Talbot* v. *Ford*, 13 Sim. 173; *Hemingway* v. *Fernandes*, *ib.* 243; *Kimberley* v. *Jennings*, 6 Sim. 340; and *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 129.

(*c*) See *Mortlock* v. *Buller*, 10 Ves. 292, 313; *Shrewsbury and Birming-*

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So, where the contract was intended by both parties to be the means of forwarding a *common* object which had utterly failed before the bill was filed, the Court refused to interfere (*d*). So, in case of mutual, though distinct agreements, the subject-matter of the one *may* be so connected with that of the other, that the Court will enforce both or neither (*e*). Where, however, the contracts, though contained in the same instrument, are really independent, the breach of one is no defence to a suit for specific performance of the other (*f*).

Hardship when not available as a defence.

But where a solicitor contracted in his own name for the purchase of an estate, the fact of his having purchased for an undisclosed client, was held to be an insufficient defence on the ground of hardship (*g*); so, also, where a person contracted for the lease of a mine, his ignorance of mining matters, and the fact of the mine having proved worthless, were held an insufficient defence (*h*).

Hardship on members of a corporation.

And in cases against public companies, the Court will not consider the hardship inflicted upon individual members, if the contract be enforced, but will look to the rights and liabilities of the corporation itself (*i*).

We may here remark that the fact of the time within which a railway company is empowered to take land having expired is no defence to a suit to enforce against them their previous contract for purchase (*k*).

Hardship when ascertained.

Hardship, in order to constitute a sufficient defence, must,

ham R. Co. v. *L. & N. W. R. Co.*, 4 De G. M. & G. 115; 6 H. L. Ca. 113; and see Fry, 115.

(*d*) *Padwick* v. *Hanslip*, 14 L. T. 543. *Sed aliter*, if there was no such community of purpose: see *Webb* v. *The Direct London and Portsmouth R. Co.*, 9 Ha. 129.

(*e*) *Croome* v. *Lediard*, 2 Myl. & K. 260; and see *Merchant's Trading Co.* v. *Banner*, L. R. 12 Eq. 18; and *vide suprà*, p. 1041.

(*f*) *Green* v. *Low*, 22 Beav. 625.

(*g*) *Saxon* v. *Blake*, 29 Beav. 438.

(*h*) *Hayward* v. *Cope*, 25 Beav. 140.

(*i*) *Per* Lord Cottenham in *Edwards* v. *Grand Junction R. Co.*, 1 Myl. & Cr. 650, 674.

(*k*) *Hawkes* v. *Eastern Counties R. Co.*, 3 De G. & S. 743; 1 De G. M. & G. 737; 5 H. L. C. 331; and see 13 & 14 Vict. c. 83, s. 20.

as a general rule, be proved to have existed at the date of the contract (*l*); unless, perhaps, it has been occasioned by the subsequent acts of the party seeking specific performance.

Fraud, mistake, surprise, misrepresentation, or concealment.

So, Equity will refuse to enforce a contract which was procured by fraud (*m*), or duress, or was entered into under a common mistake (*n*), or, in many cases, a mistake only by the defendant (*o*); or under the influence of surprise (*p*); or was founded on a fraudulent or material misrepresentation or concealment (*q*) of facts by the plaintiff (*r*).

Mistake.

Thus, where a vendor made a *bonâ fide* mistake as to the authority which he had given to the auctioneer, and the property was knocked down at a less sum than he had intended to accept, specific performance was refused (*s*): but a mere inadvertent omission to insert an intended term in the contract (*t*), or a mistake as to the legal consequences of an act (*u*), or as to the legal effect of the agreement (*x*), or as

(*l*) *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 129.

(*m*) As to evidence of which, see *Griggs* v. *Staples*, 2 De G. & S. 572.

(*n*) *Calverley* v. *Williams*, 1 Ves. J. 211; *Stapylton* v. *Scott*, 13 Ves. 425, 427; *Clowes* v. *Higginson*, 3 Ves. & B. 524; *Lord Gordon* v. *Lord Hertford*, 2 Madd. 106; *Colyer* v. *Clay*, 7 Beav. 118; *Monro* v. *Taylor*, 8 Ha. 56; *Higgins* v. *Samels*, 2 Jo. & H. 460; *Cochrane* v. *Willis*, L. R. 1 Ch. Ap. 58.

(*o*) See *Malins* v. *Freeman*, 2 Ke. 25; *Harnett* v. *Yielding*, 2 Sch. & L. 549, 554; *Howel* v. *George*, 1 Madd. 1, 11; *Baxendale* v. *Seale*, 19 Beav. 601; *Attenborough* v. *Edwards*, 3 Eq. R. 124; *Swaisland* v. *Dearsley*, 29 Beav. 430; *Hood* v. *Oglander*, 11 Jur. N. S. 498.

(*p*) See *Evans* v. *Llewellyn*, 2 Bro. C. C. 150; *Twining* v. *Morrice*, *ib.* 326; *Lord Townshend* v. *Stangroom*, 6 Ves. 328, 338; *Mortlock* v. *Buller*, 10 Ves. 305; *Willan* v. *Willan*, 16 Ves. 72; affd. 2 Dow. 274; and see Story's Eq. Jur. note to sect. 120.

(*q*) As to what is, see *Irvine* v. *Kirkpatrick*, 7 Bell, Ap. C. 186, 232, *et seq.*; *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Blake* v. *Mowatt*, 21 Beav. 603; but see *Hayward* v. *Cope*, 25 Beav. 140; concealment by vendor of a mine.

(*r*) See cases cited, *suprà*, Ch. III. and Ch. IV. p. 131, *et seq.*; and *Clermont* v. *Tasburgh*, 1 Jac. & W. 112; *Cadman* v. *Horner*, 18 Ves. 10; *Lovell* v. *Hicks*, 2 Y. & C. 46; *Cox* v. *Middleton*, 2 Dre. 208; *Barker* v. *Harrison*, 2 Coll. 546; *Harris* v. *Kemble*, 5 Bli. N. S. 730; *Denny* v. *Hancock*, L. R. 6 Ch. Ap. 1, case of a misleading sale plan; Sug. 211.

(*s*) *Day* v. *Wells*, 7 Jur. N. S. 1004; 30 Beav. 220.

(*t*) *Parker* v. *Taswell*, 2 De G. & Jo. 559; but see *Broughton* v. *Hutt*, 3 De G. & Jo. 501.

(*u*) *G. W. R. Co.* v. *Cripps*, 5 Ha. 91.

(*x*) *Powell* v. *Smith*, L. R. 14 Eq. 85.

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to the purposes for which the property may be used (*y*) is an insufficient ground of defence.

Fraud.

Where a mortgage was intended, but an absolute conveyance was in fact taken, the setting up of the latter by the mortgagee was held to be a fraud, and parol evidence was admitted to prove the terms of the contract (*z*); and where a contract for the purchase of a partial interest in an estate has been procured by fraud, a subsequent contract for the purchase of the residue, if fairly referable to the prior contract, will share its fate (*a*).

Duress.

In one case, a security obtained from a father for his son's debt, under a tacit or implied threat that the son would be prosecuted for felony unless matters were satisfactorily arranged, was held to be invalid; not merely as being a misprision of felony, but also on the ground that the father was so circumstanced as not to be a free and voluntary agent (*b*): but the mere fact of the defendant being in prison the time of signing the contract, is not of itself a sufficient defence (*c*).

Remarks on misrepresentation.

And where one party induces the other to contract on the faith of representations made to him, any one of which has been untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently; for none can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed. And although the untrue representation may in the first instance have been the result of innocent error, yet if, after the error has been discovered, the party who has innocently made the incorrect representation,

(*y*) *Mildmay* *Hungerford*, 2 Vern. 243.

(*z*) *Lincoln* v. *Wright*, 4 De G. & Jo. 16.

(*a*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Yonge* v. *Reynell*, 9 Ha. 809.

(*b*) *Williams* v. *Bayley*, L. R. 1 E. & Ir. Ap. 200; and see pp. 210, 211, 218, 219.

(*c*) *Brinkley* v. *Hann*, 1 Dru. 175; see *Cumming* v. *Ince*, 12 Jur. 331, Q. B.; *Petre* v. *Espinasse*, 2 Myl. & K. 426; *Selby* v. *Jackson*, 6 Beav. 192.

suffers the other party to continue in error and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of Equity a fraudulent misrepresentation; even though it was not so originally (*d*); and a ground for rescinding the executed contract (*e*).

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Where the statement has, or might have, been tested.

If, however, the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party: or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a Court of Justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained; and thus the notion of reliance on the representations made to him may be excluded. These remarks, however, do not apply to cases where a resort to the proper means of verification would not lead to the detection of the misrepresentation: thus, where a sale plan was so drawn as to mislead the purchaser as to the boundaries of the estate he was buying, and an actual inspection of the property with the sale plan in his hand only confirmed his mistaken impression, specific performance of the contract was refused against him (*f*).

Where it is on a matter of mere speculation;

Again, where the subject of the contract is in its nature uncertain,—where all that is known about it is matter of inference from something else, and the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill,—it may not be easy to presume that representations made by one would have any material influence upon the other (*g*);

(*d*) *Per* Lord Cranworth, 1 De G. M. & G. 708.

(*e*) *Clapham* v. *Shilleto*, 7 Beav. see p. 149.

(*f*) *Denny* v. *Hancock*, L. R. 6 Ch. Ap. 1.

(*g*) See judgment in *Clapham* v. *Shilleto*, 7 Beav. 149; and see *Pule-*

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and it has been laid down that if a purchaser, choosing to judge for himself, does not avail himself of the means of knowledge open to him or to his agents, he cannot pretend, by way of defence, that he was deceived by the vendor's representations (*h*).

as, *e.g.*, as to the value of a mine.

Thus, in one case, a purchaser of mines which proved to be worthless, having personally inspected them before signing the contract, was not allowed to set up his ignorance of mining matters as a defence to the vendor's suit (*i*); and it was also held that there was no obligation on the vendor to inform the purchaser, that the mine had been previously worked and found unprofitable (*k*).

Agreement fair, as between parties, not avoided by fraud of third person.

And an agreement, fair as between the parties, is not invalid merely because it may have been concocted and brought about by a third person with a fraudulent intention of benefiting himself (*l*).

Want of mutuality of remedy—whether a defence,

Want of mutuality of remedy is a ground of defence not unfrequently relied on; and respecting which the rules of the Court seem somewhat undefined. The principle would seem to be one of apparent Equity: *viz.*, that a defendant ought not be harassed with litigation founded on an agreement which he himself could not enforce if the plaintiff were to think fit to stop proceedings. For this reason, it was once doubted whether a plaintiff could enforce a written agreement which he himself had not signed: but it was ultimately decided (*m*) that he could; inasmuch as filing the bill binds him to the contract, and from that time there is mutuality (*n*). So, as we have seen, the personal incapacity

ford v. *Richards*, 17 Beav. 96; *suprà* 124; *Jennings* v. *Broughton*, 5 De G. M. & G. 126; *Haywood* v. *Cope*, 25 Beav. 140; and compare *Higgins* v. *Samels*, 2 J. & H. 460.

(*h*) *Attwood* v. *Small*, 12 Cl. & F. 232.

(*i*) *Haywood* v. *Cope*, 25 Beav. 140.

(*k*) *Ib.*

(*l*) *Bellamy* v. *Sabine*, 2 Ph. 425.

(*m*) See 2 Coll. 161.

(*n*) *Martin* v. *Mitchell*, 2 Jac. & W. see p. 427; *Coleman* v. *Upcot*, 5 Vin. Abr. 528; *Dowell* v. *Dew*, 1 Y. & C. C. C. 345; *Butler* v. *Powis*, 2 Coll. 161; see *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57; but see also *Gaskarth* v. *Lord Lowther*, 12 Ves. 107.

of the plaintiff to enter into the contract, is generally, if subsisting at the time of the bill being filed, a good defence (*o*). But the fact of one party to a contract having so acted as to preclude his right (*p*); or even having by accident lost his right (*q*) to enforce it in Equity, will not affect the remedies of the other party: and it not unfrequently happens, in other cases, that plaintiffs obtain decrees for specific performance of agreements, the specific performance of which could not have been enforced against them as defendants (*r*).

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when founded on alleged want of title in plaintiff vendor.

The non-mutuality defence has generally been grounded upon the alleged entire, or partial, want of title in a plaintiff vendor: such want of title, it must be remembered, being urged as an objection to the existence or validity of the contract; and not by way of denial of his present ability to give to, or procure for, the defendant, his rights under the same. Thus, it has been held, that A. cannot enforce, against C., an agreement for the sale to him of B.'s estate; even although B. be willing to confirm the contract (*s*): and it has been considered doubtful by Lord St. Leonards (*t*) "whether there is *any* case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report" (*u*).

The jurisdiction is discretionary with the Court.

But, as a general rule, where no legal invalidity affects the contract, the enforcement of it in Equity is a matter of judicial discretion (*x*); and, in several cases, specific per-

(*o*) *Vide suprà*, p. 1044; and see 1 De G. M. & G. 525.

(*p*) *South-Eastern R. Co.* v. *Knott*, 10 Ha. 122; *Hawkes* v. *E. C. R. Co.*, 1 De G. M. & G. 758; 5 H. L. Ca. 331.

(*q*) 1 De G. M. & G. 758.

(*r*) See *Martin* v. *Pycroft*, 2 De G. M. & G. 785, 795.

(*s*) *Noel* v. *Hoy*, cited Sug. 217; and see *Tendring* v. *London*, 2 Eq. Ca. Ab. 680; *Armiger* v. *Clarke*, Bunb. 111; *Hamilton* v. *Grant*, 3 Dow. 33, 42.

(*t*) Sug. 12th edit. 241, n. (*p*).

(*u*) See on this point, *Bryan* v. *Lewis*, Ry. & Moo. 386 (a case at Law on a sale of goods); *Lechmere* v. *Brasier*, 2 Jac. & W. 289; *Dalby* v. *Pullen*, 3 Sim. 29; 1 Russ. & M. 296; and the cases cited, *infrà*, n. (*b*).

(*x*) 2 Y. & C. C. C. 64; and see remarks of Lord Eldon in *White* v. *Damon*, 7 Ves. 35, as to how the discretion is to be exercised.

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formance has been decreed at the suit of vendors who, contracting under the *bonâ fide* belief that they could make a good title, afterwards, on discovering that they had no title either legal or equitable, procured the concurrence of the necessary parties (*y*): as, also, at the suit of vendors who had contracted to sell the fee simple, knowing that they had only a life estate or other limited interest, and relying on being able to procure the concurrence of the parties entitled in remainder (*z*): so, it would seem, a vendor who has contracted to sell in the *bonâ fide* belief that he is absolutely entitled, when in fact he has only a partial interest, may enforce the contract, if he is ultimately able to complete the title (*a*).

When a vendor having no title contracts to sell.

And it seems by no means clear, whether, even in the extreme case of A. contracting to sell the estate of B., A. would not be entitled to specific performance, if, by procuring a conveyance from B., he were able to make a good title at the time fixed for the delivery of the abstract, or even at the time fixed for completion (*b*). Perhaps, in most of such cases, the material point may be, whether the purchaser, upon discovering that the estate is not bound, has at once repudiated the contract, or has continued to negotiate upon the footing of its being still subsisting (*c*). At any rate, if a purchaser intends to rely on the objection that the vendor has only a limited interest, he must do so at once, and cannot avail himself of it, after having required the concurrence of persons who can complete the title (*d*).

(*y*) See *Hoggart* v. *Scott*, 1 Russ. & Myl. 293, a case of mistake as to the proper parties to exercise a power of sale under a will; *Chamberlain* v. *Lee*, 10 Sim. 444, where the frontage of the estate was found to belong to a third person; *Eyston* v. *Symonds*, 1 Y. & C. C. C. 608, where the estate had escheated to the Crown; and see *Williams* v. *Carter*, cited Sug. 217; *Graham* v. *Oliver*, 3 Beav. 124; *Hawkes* v. *E. C. R. Co.*, 1 De G. M. & G. 737; 5 H. L. C. 331.

(*z*) *Lord Stourton* v. *Meers*, cited 2 P. Wms. 630; *Wynn* v. *Morgan*, 7 Ves. 202; *Coffin* v. *Cooper*, 14 Ves. 205; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 54.

(*a*) *Murrell* v. *Goodyear*, 1 De G. F. & Jo. 432; 6 Jur. N. S. 91; on appeal, *ib.* 356; 1 De G. F. & Jo. 432.

(*b*) See *Mortlock* v. *Buller*, 10 Ves. 315; *Boehm* v. *Wood*, 1 Jac. & W. 421; and see 2 Y. & C. C. C. 64.

(*c*) See *Eyston* v. *Simonds*, 1 Y. & C. C. C. 608; *Salisbury* v. *Hatcher*, 2 Y. & C. C. C. 65.

(*d*) *Murrell* v. *Goodyear*, *ubi suprà*.

Nock v. Newman.

In *Nock* v. *Newman*, A. B., who had an interest in the property, was no party to the contract for sale. Specific performance having been resisted on other grounds, the title was referred, and the abstract, as carried in before the Master, stated that A. B. was willing to join in the conveyance. Exceptions were taken to the Master's report in favour of the title, and on the hearing (6th July, 1837), upon the exceptions and further directions, the defendants for the first time raised the objection that A. B.'s interest was not bound by the contract. Upon this the vendors produced a signed agreement, procured just before the hearing, by which A. B. agreed to join in the conveyance; and Sir L. Shadwell, V.-C., held that it would not do thus "to bolster up the case at the last moment," and dismissed the bill with costs; but this decision was reversed without hesitation by Lord Cottenham (*e*).

Where the title is not perfected until after a suit is commenced.

However, in a modern case, where trustees with a power of sale exerciseable with the consent of the tenant for life, entered into a contract, and filed a bill for specific performance, but did not procure the requisite consent until after the commencement of the suit, V.-C. Knight Bruce intimated a doubt whether the bill should not be dismissed, although this had not been contended for by the defendant (*f*); and, in a later case, where the contract was for a yearly tenancy, with an option of taking a lease for twenty-one years, and the tenant, on finding that the landlord could only grant a lease for twenty years and a quarter, repudiated the contract, it was held that the landlord, who, before the cause was heard, but not till after he had filed his bill for specific performance, was in a position to grant the stipulated lease, could not enforce the contract, which was void for want of mutuality (*g*).

Purchaser, when pre-

But the purchaser may, by his contract, preclude himself

(*e*) *Ex relatione* Mr. Hayes, and from his brief on the appeal.

(*f*) *Adams* v. *Broke*, 1 Y. & C. C. C. 627, 630.

(*g*) *Forrer* v. *Nash*, 6 N. R. 361; 11 Jur. N. S. 789; 35 Beav. 167.

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cluded from taking the objection.

from objecting that the consent of a specified person is necessary, or that the sale is a breach of trust; thus, *e.g.*, where trustees for sale, who had no power of leasing, granted leases which materially lessened the value of the property; and then expressly sold the estate, subject to the unauthorized leases—the want of authority being plainly disclosed—the title was forced upon the purchaser (*h*).

The existence of an incumbrance not a matter of defence.

The existence of a heavy incumbrance on the estate, and the mental incapacity of the incumbrancer, being matters of conveyance and not of title (*i*), are no conclusive defence to a vendor's suit (*k*).

Nominal contractor.

The fact that the vendor contracted to sell his own estate, in the name of, or as agent for, another (*l*); or that the nominal purchaser was in fact the agent for a third person with whom the vendor has quarrelled upon other matters (*m*), or to whom he has given a bare refusal (*n*) to deal for the estate; is not, in general, any defence to a suit for specific performance: unless the case can be brought within the class of cases noticed *suprà* (*o*), by showing that the misrepresentation was used as the inducement to the defendant to enter into the contract (*p*).

(*h*) *Nicholls* v. *Corbett*, 3 De G. J. & S. 18; 34 Beav. 376; and see *Want* v. *Stallibrass*, L. R. 8 Exch. 175, 179.

(*i*) *Suprà*, p. 284.

(*k*) *Duke of Beaufort* v. *Glynn*, 3 Sm. & G. 213; 1 Jur. N. S. 888; affirmed 890.

(*l*) *Fellowes* v. *Lord Gwydyr*, 1 Russ. & M. 83.

(*m*) *Hall* v. *Warren*, 9 Ves. 605.

(*n*) Sug. 219, citing *Lord Irnham* v. *Child*, 1 Bro. C. C. 92, see p. 95; *sed quære*, whether this doctrine can be extended to cases of refusal grounded on any particular and specified reason: see. 1 Coll. 219; and see *Popham* v. *Eyre*, Lofft, 786; *Bonnett* v. *Sadler*, 14 Ves. 528; *O'Herlihy* v. *Hedges*, 1 Sch. & L. 123.

(*o*) Page 798.

(*p*) *Phillips* v. *Duke of Bucks*. 1 Vern. 227; *Scott* v. *Langstaffe*, cited Lofft, 797; and see *Nelthorpe* v. *Holgate*, 1 Coll. 203. It appears that specific performance was decreed in *Phillips* v. *Duke of Bucks*. see 14 Ves. 527, n. The Duke's equity seems to have been of (according to modern notions) a very doubtful character: amounting, in substance, to his having sold the estates at an undervalue, by way of bribe to the Chancellor before whom causes, in which the Duke was interested, were depending: see the account of the transaction from Roger North, cited Sug. 219.

It seems to be doubtful whether it is a good defence to a purchaser's suit for specific performance that the vendor, when he signed the contract, supposed the purchaser to be another person of the same name.

Insertion of penalty, no defence.

The insertion in the contract of a penalty in case of non-performance, is no defence to a suit for specific performance (q): nor, it seems, is a stipulation for the payment of a specified sum as liquidated damages (r): in fact, decrees have been made upon agreements which took the shape of bonds (s): but the obligee must elect between his legal and equitable remedies (t). A bond void at Law may be a good agreement in Equity (u).

Inability to recover damages at Law, how far a defence.

The circumstance that damages could not be recovered upon the contract at Law, has not been universally considered a good defence to a suit for specific performance, although, as observed by Lord Hardwick (x), "There are very few cases in which a Court of Equity can decree a performance of a covenant or agreement upon which there can be no action at Law, according to the words of the articles and the events which have happened:" Lord St. Leonards considers the result of the authorities (which are conflicting) to be, that although "Equity cannot contradict or overturn the grounds or principles of Law," it will yet decree specific performance of an agreement void at Law, "if there is a clear ground for the interference of Equity, according to the general rules of the Court" (y).

(q) *Howard* v. *Hopkyns*, 2 Atk. 371; *Coles* v. *Sims*, 5 De G. M. & G. 1; and see *Logan* v. *Wrenhall*, 1 Cl. & F. 611, 630.

(r) *Darby* v. *Whitaker*, 4 Drew. 134.

(s) *Hobson* v. *Trevor*, 2 P. Wms. 191; *Butler* v. *Powis*, 2 Coll. 156; but not if the plaintiff have enforced the penalty, *Sainter* v. *Ferguson*, 1 Mac. & G. 286. As to the jurisdiction of a Court of Equity to restrain a breach of an agreement secured by a bond, see *Clarkson* v. *Edge*, 33 Beav. 227; *Fox* v. *Scard*, *ib.* 327, 328; and see 36 & 37 Vic. c. 66, s. 24, sub-sect. 5, when the Act comes into operation.

(t) *Fox* v. *Scard*, 33 Beav. 327, 328.

(u) *Squire* v. *Whitton*, 1 H. L. C. 333.

(x) See *Whitmel* v. *Farrel*, 1 Ves. 256, 258.

(y) Sug. 220, and see cases there referred to. On the other hand, the fact of damages being recoverable at Law is inconclusive as to the right in Equity.

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Contract incapable of complete performance.

And Equity will not decree specific performance of part of a contract, if unable to enforce specific performance of all its material terms (*z*).

3rd—Matters relating to estate:— original defects in, how far a defence;

As to the 3rd of the above heads.—Upon defects in the estate itself, we may refer to former observations respecting misdescriptions and compensation (*a*): we may also remark that, although either the original non-existence of, or the want of a sufficient title to, a material part of the property, or that part of it which may have formed the inducement to the purchaser, is a sufficient defence to a bill for specific performance, yet mere non-existence does not, universally, as a ground of defence, stand so high as want of title; for it may, obviously, be often a very different matter to a purchaser whether he be simply unable to get a particular part of what he contracted for, or whether such part will be liable to be held by another person, and converted into a nuisance (*b*).

public nuisance;

It was considered, in one case, that the existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose (its existence, however, being unknown to either party, although easily ascertainable by the vendor), is no defence to his suit for specific performance, although it will induce the Court to try the case strictly (*c*).

public inconvenience.

So, where, pending a suit for specific performance, the defendants, a railway company, prosecuted their works in a manner contrary to the terms of the contract, and opened the line, it was held that the inconvenience which would be caused to the public by interfering with the traffic, was not an available defence (*d*).

(*z*) *Suprà*, p. 1046, n. (*p*).

(*a*) *Suprà*, Ch. III. and IV. As to how far the purchases of several lots are connected, *vide infrà*, pp. 1074, 1076. And see the judgment in *Knatchbull* v. *Grueber*, 1 Madd. 167.

(*b*) See *S. C. ib.* 153, 165.

(*c*) *Lucas* v. *James*, 7 Ha. 410, 418.

(*d*) *Raphael* v. *Thames Valley R. Co.*, L. R. 2 Ch. Ap. 147; reversing M. R. L. R. 2 Eq. 37.

Destruction of estate, not a purchaser's defence.

We have already seen (*e*), that the accidental destruction or deterioration of the estate subsequently to the contract, is no defence to the vendor's bill for specific performance.

4th—Matters relating to title: want of title, considered as vendor's defence.

As to the 4th of the above heads.—Want of title to the estate is a defence which may occasionally be available as well to vendor as to purchaser. As a general rule, however, a vendor will be compelled to convey his interest, if an imperfect one, in the estate, if the purchaser choose to accept it without compensation (*f*): so he will be compelled to make good the contract out of any interest which he has subsequently acquired (*g*): or to procure the concurrence of parties who are bound to convey at his request (*h*) *e.g.*, trustees of the legal estate (*i*): and in one case, a purchaser of copyholds, who had acquired the whole legal and beneficial interests, was nevertheless held entitled in a suit against his vendor to require the concurrence of mere nominal trustees, who had never been admitted under a voluntary covenant to surrender (*k*). So, a vendor, professing to sell an unincumbered estate, but having in fact only an equity of redemption, as a general rule, will be compelled to redeem the mortgage, and obtain a conveyance from a mortgagee (*l*). So a tenant in tail in remainder will be decreed to convey a base fee, and covenant to bar the remainders over upon becoming tenant in tail in possession (*m*).

Cases in which it is available.

But Equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to

(*e*) *Suprà*, p. 249.

(*f*) See *Harnett* v. *Yielding*, 2 Sch. & L. 554; Sug. 218; *Bradley* v. *Munton*, 15 Beav. 460; *Barrett* v. *Ring*, 2 Sm. & G. 43.

(*g*) See cases cited, *suprà*, p. 807, and *Carne* v. *Michell*, 10 Jur. 910, V.-C. S.

(*h*) See 1 Madd. 11; *Costigan* v. *Hastler*, 2 Sch. & L. 160, 166.

(*i*) See Sug. 349; *Crop* v. *Norton*, 2 Atk. 74, 75.

(*k*) *Steele* v. *Waller*, 28 Beav. 466; but the plaintiff did not get his costs; *sed quære* this case, and see *Minton* v. *Kirwood*, L. R. 1 Eq. 449; affirmed, L. R. 3 Ch. Ap. 614.

(*l*) But compare *Wedgwood* v. *Adams*, 8 Beav. 600, where the Court on the ground of hardship refused to interfere.

(*m*) *Lord Bolingbroke's case*, cited 1 Sch. & L. 19, n.

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require; *e.g.*, a husband to procure the concurrence of his wife (*n*), or son (*o*), except perhaps, where he has expressly agreed to procure such concurrence (*p*); or a tenant for life to procure the concurrence of trustees for sale of the reversion, they being under no obligation to comply with his request (*q*); nor will it compel him to perfect the title by exercising a power of purchasing and settling another estate in lieu of that which he has contracted to sell (*r*); or by making himself the personal representative of a deceased owner (*s*); or to complete a contract which he has entered into in the belief that he is absolute owner, whereas he can in fact only sell under a power of sale and exchange, and with a liability to re-invest the purchase-money (*t*); or to purchase and convey the tithes of an estate contracted to be sold as tithe free (*u*): or to convey, as mortgagee under a power of sale, an estate which he claims as absolute owner by foreclosure—and thus render himself liable to account for the purchase-money (*x*): or, in the case of a fiduciary vendor, to carry out a contract, which might reasonably expose him to liability at the suit of his *cestuis que trust* (*y*).

It has even been held; that where a tenant for life, with the ultimate reversion in fee, contracted, as it appeared to the Court, merely as the agent of his trustees (who had a power to sell the fee simple), he was not bound, upon the contract being held void as against the trustees, to make it good out of the fee simple, which had subsequently vested in himself by the failure of the intervening limitations (*z*).

(*n*) *Emery* v. *Wase*, 8 Ves. 505, 514; *Howel* v. *George*, 1 Madd. 1, 6; see *Jordan* v. *Jones*, 2 Ph. 170; *Ex parte Blake*, 16 Beav. 471; see and compare *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*o*) *Howel* v. *George*, *ubi suprà*.

(*p*) See *Emery* v. *Wase*, 8 Ves. 505, where the earlier cases are cited; but the point seems very doubtful, see Sug. 206; *Innes* v. *Jackson*, 16 Ves. 367.

(*q*) *Thomas* v. *Dering*, 1 Ke. 729.

(*r*) *Howel* v. *George*, 1 Madd. 1.

(*s*) *Williams* v. *Bland*, 2 Coll. 575.

(*t*) *Hood* v. *Oglander*, 11 Jur. N. S. 498; 34 Beav. 513, 519; *sed quære*.

(*u*) *Todd* v. *Gee*, 17 Ves. 2[illegible]

(*x*) *Watson* v. *Marston*, 4 De G. M. & G. 230.

(*y*) *Sneesby* v. *Thorne*, 1 Jur. N. S. 536, 1058; 7 De G. M. & G. 399 and cases cited, *suprà*, p. 1047, n. *x*.

(*z*) *Mortlock* v. *Buller*, 10 Ves. 292 316.

But this decision would probably not now be followed (*a*); and, of course, the decision was different, where a tenant for life, similarly circumstanced, contracted in his own name, as if seised in fee simple (*b*). But the Court will not decree specific performance by directing an invalid assurance to be executed by a tenant for life, which might encumber and embarrass remaindermen (*c*).

Vendor, when compelled to convey part of *estate* with abatement.

Where the want of title is only partial,—*i.e.*, where it affects only part of the estate, or only part of that interest in it which was agreed to be sold,—the question arises, whether the vendor can resist the purchaser's claim to specific performance with a compensation, or, to speak more accurately, an abatement of the purchase-money. This right generally, but not universally (*d*), exists in each class of cases (*e*). Thus, want of title to the entire interest contracted for will not, it seems, be available as a defence for the vendor, if the purchaser elects to take such estate as the vendor can convey (*f*); or to dispense with the concurrence of a person having a partial interest in the property,—as, *e.g.*, a wife entitled to dower,—upon being allowed an abatement from his purchase-money (*g*). So, the want of title to even a considerable part of the estate is not necessarily a reason why the vendor should not convey the residue (*h*). But, cases might occur, where, on the ground of hardship, Equity would refuse to assist a purchaser; as in the case put by Lord St. Leonards (*i*), of a vendor showing a good title to his mansion-house and park, but having no title to a "large adjoining estate held and sold with it." In a case before Sir L. Shadwell, V.-C., where, upon a contract to sell the entirety of a lace

(*a*) See 2 Ba. & B. 60.

(*b*) *Butler* v. *Powis*, 2 Coll. 156.

(*c*) *Ellard* v. *Lord Llandaff*, 1 Ba. & B. 241; see 251.

(*d*) 1 Ves. & B. 353.

(*e*) 10 Ves. 316; 17 Ves. 401; 1 Ves. & B. 353; 3 Ves. & B. 192; 4 Sim. 127.

(*f*) *Barret* v. *Ring*, 2 Sm. & G. 43.

(*g*) *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(*h*) *Western* v. *Russell*, 3 Ves. & B. 187, 192; and see *Hooper* v. *Smart*, *Bailey* v. *Piper*, L. R. 18 Eq. 683, where the vendor had only a moiety of the estate which he contracted to sell.

(*i*) Sug. 316.

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manufactory, it appeared that the vendors had only nine-sixteenths, and that the remaining shares clearly belonged to another party, who had also a charge on the vendor's shares for a sum nearly equal to the purchase-money, the Court refused the purchaser specific performance with an abatement (*l*): a decision which Lord St. Leonards suggests may be referred to the nature of the property (*m*), but otherwise disapproves of (*n*): he seems, however, to consider that the decision would have been correct, had the remaining shares been held by the vendors themselves under a defective title.

In a subsequent case, the same learned V.-C., where the vendors had agreed to sell two-sixths of certain leaseholds, and then found that they had only four-twentieths, decreed specific performance with an abatement; observing, "this is very unlike a case where parties contract to sell the whole, but can only sell a part" (*o*): from which remark, as in the case before the Court there was no question as to leaving part of the property in the hands of the vendors with a bad title, it may be inferred that his Honour, upon general principles, approved of his former decision.

Remarks on the cases.

It seems, however, difficult to understand why specific performance should be refused in the former case; or to distinguish it from the case put by Lord Hardwicke, of two tenants in common agreeing to sell the entirety of an estate, and one of them dying, and a decree being made against the survivor in respect of his share, although the contract could not be enforced against the representatives of the deceased (*p*). In a later case, where the former decisions do not appear to have been cited, the Court refused specific performance with an abatement, when the vendor could make a title to only three-fourths of the property, and the

(*l*) *Wheatley* v. *Slade*, 4 Sim. 126.

(*m*) And see *Price* v. *Griffith*, 1 De G. M. & G. 80, 85.

(*n*) Sug. 318.

(*o*) *Jones* v. *Evans*, 12 Jur. 466; and see, as bearing on the question *à converso*, *Reynell* v. *Sprye*, 8 Ha. 222; 1 De G. M. & G. 660.

(*p*) See *Att.-Gen.* v. *Day*, 1 Ves. 218, 224.

remaining fourth was clearly vested in other parties: but this seems to have depended on the fact of trust-money being on the security of the vendor's interest in the property to an amount exceeding what would have been payable by the purchaser, had his claim to an abatement succeeded (*q*). But in a very recent case, where the vendor agreed to sell the entirety of a freehold estate, and it was subsequently discovered that an undivided moiety belonged to other parties, Sir Charles Hall, V. C., held that the purchaser was entitled to the vendor's moiety on payment of one-half the purchase-money (*r*). The result of the authorities appears to be that, except where there is a good defence on the ground of hardship or the like, the Court will insist on a vendor making good his contract to the extent which he is able to make it good, and on his submitting to a proportionate reduction of the purchase-money, if the purchaser is willing to complete on these terms; and that in applying this rule no distinction will be drawn between cases where a vendor has contracted to sell an entire estate, when he has only part of it; and cases where he has contracted to sell undivided shares in the estate, and has not so many shares as he contracted to sell.

Condition for rescinding may be enforced.

The right, however, of a purchaser to require specific performance with an abatement of the purchase-money is subject to the vendor's right to rescind the contract, where such a right is reserved by the conditions: thus it has been held, that a condition for rescinding the contract, if counsel should be of opinion that a marketable title could not be made, enabled the vendor to rescind, upon counsel rejecting the title to one undivided third of the property (*s*): so, in the converse case, where the purchaser had a right to rescind the contract, in case his objections to title were not removed, and he gave notice to vacate the ground of the vendor's want of title to a small portion of the estate, it was

(*q*) *Maw* v. *Topham*, 19 Beav. 576.

(*r*) *Hooper* v. *Smart*, L. R. 18 Eq. 683.

(*s*) *Williams* v. *Edwards*, 2 Sim. 78; and see *Mawson* v. *Fletcher*, L. R. 6 Ch. Ap. 91.

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held that he was not compellable to complete with an abatement (*t*).

Of course, no such question can be raised by a vendor, when, upon the purchase of several lots by the same purchaser, the title to one or more of such lots is found to be defective.

No abatement for defect in title.

As a general but not universal rule, every purchaser has a right to take what he can get, with compensation for what he cannot get (*u*); but he cannot claim a conveyance of an interest to which a vendor shows a doubtful or defective title, with an abatement in respect of the imperfection in title (*x*), except, perhaps, where the defect is of a temporary character, or is otherwise a fit subject for compensation. Thus, where a good title was deduced, but the vendor's wife refused to release her dower, specific performance was decreed at the purchaser's suit with a compensation (*y*). Conduct or acquiescence on the part of the purchaser which amounts to an acceptance of the title, may yet be insufficient as a waiver of his right to compensation (*z*).

Vendor, when compelled to convey partial *interest* in estate, with abatement.

So, in general, when the vendor's *interest* is less than what he professes to sell, the purchaser may take what he can have, with an abatement (*a*); as in the case put by Lord Eldon (*b*), of a man contracting to sell the fee simple, and having only a term for one hundred years; so, where the contract was, in effect, for an absolute term of twenty-one years, and it was found that the actual term might determine by the cesser of certain lives, specific performance was decreed, with an abatement in respect of the difference between the absolute and defeasible interests (*c*). There was a similar

(*t*) *Ashton* v. *Wood*, 3 Jur. N. S. 1164.

(*u*) *Per* Turner, L. J., in *Hughes* v. *Jones*, 3 De G. F. & Jo. 307, 315.

(*x*) *Williams* v. *Higden*, 1 C. P. C. 500.

(*y*) *Wilson* v. *Williams*, 3 Jur. N. S. 810, V.-C. W.

(*z*) *Hughes* v. *Jones*, 3 De G. F. & Jo. 307, 316.

(*a*) *Dyas* v. *Cruise*, 2 J. & L. 460.

(*b*) *Wood* v. *Griffith*, 1 Will. Ch. Ca. see 44: Sug. 306.

(*c*) *Dale* v. *Lister*, cited 16 Ves. 7; and see p. 11.

decision where a term was sold with the benefit of A.'s covenants for renewal, and such covenants were found to be not absolute, but binding only a contingent portion of his assets (*d*). So, where the agreement being for a term of thirty-one years, a title could be shown only to a term of twenty-one years, and a covenant for renewal of an additional term of ten years (*e*). So, where A. contracted for the purchase of an estate from B., who represented himself to be the owner in fee, but was in fact entitled only *pur autre vie*, with remainder to his wife in fee, specific performance was decreed at the suit of A., with compensation in respect of the interest of B.'s wife (*f*). So—there being the common condition for compensation—when property sold as a renewable leasehold was in fact merely for a term certain, the contract was enforced with an abatement (*g*). So, it was admitted by Lord Eldon (the case before him being that of a contract by a tenant for life for sale of the fee) (*h*), that if a vendor having a partial interest in an estate, enter into a contract, representing and agreeing to sell it as his own, the purchaser may take what he can have, with an abatement. However, in a case (*i*) before Lord Langdale, M.R., when a tenant for life, with remainders to his first and other sons in tail, with remainder to himself in fee, contracted to sell the fee simple, speculating on the consent of the trustees for sale, which consent was eventually withheld, his Lordship refused to enforce specific performance to the extent of the life-estate and remainder in fee, and with an abatement; but the decision is disapproved of by Lord St. Leonards (*k*); and in a subsequent case (*l*), Lord Langdale appears to refer to

(*d*) *Milligan* v. *Cooke*, 16 Ves. 11, 12; but, *semble*, the Court will not now consider the comparative values of covenants; see *Ridgway* v. *Gray*, 1 Mac. & G. 109; and *Law* v. *Urlwin*, 16 Sim. 390; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602.

(*e*) *Hanbury* v. *Litchfield*, 2 Myl. & K. 629.

(*f*) *Barnes* v. *Wood*, L. R. 8 Eq. 424, and see *Wilson* v. *Williams*, *suprà*; and see and distinguish *Castle* v. *Wilkinson*, L. R. 5 Ch. Ap. 534.

(*g*) *Painter* v. *Newby*, 11 Ha. 26 see p. 30 as to church leases.

(*h*) *Mortlock* v. *Buller*, 10 Ves. 315.

(*i*) *Thomas* v. *Dering*, 1 Keen, 729.

(*k*) Sug. 308; as to the difficulty of fixing the amount of abatement being a reason for refusing relief, see *White* v. *Cuddon*, 8 Cl. & F. 766, 792.

(*l*) *Graham* v. *Oliver*, 3 Beav., see p. 128; and see *Neale* v. *Mackenzie*, 1 Keen, 474.

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his former judgment as if not altogether satisfied of its propriety. And in a converse case of a person entitled in fee, subject to a life estate, agreeing to sell the fee simple in possession, speculating on the concurrence of the tenant for life, which was withheld, specific performance, with an abatement in respect of the life estate, was decreed by V.-C. K. Bruce; and the vendor, having knowingly offered for sale an interest to which he was not entitled, was not allowed to avail himself of a condition purporting to reserve the right of rescinding the contract if the title should prove defective (*m*).

Indemnity, neither given nor taken compulsorily.

In two cases above referred to (*n*), where the vendor's title was only contingently defective, it was held, that the purchaser might take the estate with an indemnity; but it has been settled by subsequent decisions, that an indemnity will not be enforced against either party (*o*), unless it be provided for by special agreement (*p*). For example, where trustees of a settled estate, which, with other properties, was subject to a pecuniary charge, were empowered to sell at the request, and by the direction, of the tenant for life, a contract entered into by the latter, without the consent of the trustees, was enforced after his death; but, in the absence of any special agreement, without any indemnity against the charge (*q*).

Vendor's and pur-

And matters which would not be considered fit subjects

(*m*) *Nelthorpe* v. *Holgate*, 1 Coll. 203.

(*n*) *Dale* v. *Lister*, cited 16 Ves. 7; *Milligan* v. *Cooke*, 16 Ves. 1. As to the damages which may be recovered by the purchaser in such a case, *vide suprà*.

(*o*) *Balmanno* v. *Lumley*, 1 Ves. & B. 224; *Paton* v. *Brebner*, 1 Bli. 42, 66; *Aylett* v. *Ashton*, 1 Myl. & C. 105; *Nouaille* v. *Flight*, 7 Beav. 521; *Ridgway* v. *Gray*, 1 Mac. & G. 109, 111; see at Law, *Blake* v. *Phinn*, 3 C. B. 976.

(*p*) *Walker* v. *Barnes*, 3 Madd. 247; *Aylett* v. *Ashton*, 1 Myl. & C. 105; *Paterson* v. *Long*, 6 Beav. 598; nor has an arbitrator on the agreement any implied authority to award an indemnity; *Ross* v. *Boards*, 8 Ad. & E. 290, 294. As to the mode of indemnity on purchase by railway company of part of lands subject to rent-charge, see *Powell* v. *South Wales R. Co.*, 1 Jur. N. S. 773.

(*q*) *Bainbridge* v. *Kinnaird*, 32 Beav. 346.

chaser's rights in respect of abatement, not reciprocal.

for compensation as against a purchaser, may entitle him to an abatement of purchase-money, if he elect to take the estate; *e.g.*, the existence of mining rights (*r*), or rights of common over the estate (*s*), or the want of a road which the vendor had agreed, but was unable to make (*t*).

Right to abatement lost, by contracting for estate with notice of defect;

If, however, the purchaser, at the time of entering into the contract, be aware of the existence of the outstanding interest, or that the vendor is agreeing for more than he can give, or if he proceed in the matter with notice of the defect and without insisting on it (*u*), no abatement of purchase-money will, it is conceived, be allowed (*x*). Thus, where a husband and wife agreed to sell the wife's estate in fee simple, and the purchaser knew that the estate belonged to the wife who refused to convey, it was held that he could not compel the husband to convey his interest at an abated price (*y*). Nor will an abatement be allowed in respect of a lease granted by the vendor, but which is void by statute (*z*). And the omission of the purchaser to make proper inquiries before accepting the title, may preclude him from claiming compensation for a defect which, with a little more diligence, he would have discovered. Thus, where on an agreement for the purchase of an advowson, nothing was said on either side as to the amount of the income of the living, or as to the basis of calculation on which the purchaser's offer was founded, and the living was in fact charged with the repayment of a loan from Queen Anne's Bounty, the purchaser suing for specific performance was held not to be entitled to an abatement; inasmuch as the charge was an ordinary liability, the existence of which he would have learnt by

(*r*) *Seaman* v. *Vawdrey*, 16 Ves. 390; *Martin* v. *Cotter*, 3 J. & L. 496, 509 (right of turbary and getting limestone); but see *Smithson* v. *Powell*, 20 L. T. Ch.; *Ramsden* v. *Hirst*, 4 Jur. N. S. 200, where the mines had been abandoned, though the right to work them continued.

(*s*) Sug. 312.

(*t*) *Peacock* v. *Penson*, 11 Beav. 355.

(*u*) *Infrà*, p. 1077.

(*x*) See *Lawrenson* v. *Butler*, 1 Sch. & L. 13, 19; *Harnett* v. *Yielding*, 2 Sch. & L. 549, 560; *Nelthorpe* v. *Holgate*, 1 Coll. 203, 215.

(*y*) *Castle* v. *Wilkinson*, L. R. 5 Ch. Ap. 534.

(*z*) *Morris* v. *Preston*, 7 Ves. 557.

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prudent inquiry (*a*). So, in one case where the purchaser at the date of the contract was aware that the property was in the occupation of a tenant, and made no previous inquiry as to the nature and duration of the tenant's interest, it was held that he was not entitled to specific performance with an abatement, on the ground that the property was subject to an undisclosed lease (*b*).

or by partial misrepresentation.

And where a plaintiff had obtained an agreement for an exchange with immediate possession, under a false representation to the defendant that the tenants of the latter would accede to the arrangement, he was not allowed to claim specific performance subject to the tenant's interests (*c*).

Vendor, how far bound to make good interest contracted for, out of his own higher interest.

It may occasionally happen that the vendor's interest is found to exceed that which he contracted to sell: in which case he must, as a general rule, make good the latter to the best of his ability: for instance, where a vendor, in fact seised in fee, contracted to sell the estate as copyhold, stating it to be equal in value to freehold, it was held that he ought (but for other grounds of defence) to have conveyed the freehold (*d*). It has, however, been held, that, on an agreement to assign a lease, Equity cannot decree an underlease, although the assignment would induce a forfeiture; since the vendor's motive to the assignment may have been to escape the rent and covenants (*e*); but the defence, as Lord St. Leonards remarks, is one which could seldom be set up by a vendor (*f*).

Want of title, where a defence for

If the purchaser be unwilling to complete with an abatement, he may resist specific performance (*g*) on the ground of the tenure of the property, or of a material part of it,

(*a*) *Edwards-Wood* v. *Marjoribanks*, 3 De G. & Jo. 329; 7 H. L. Ca. 806.

(*b*) *James* v. *Lichfield*, L. R. 9 Eq. 51; and see *Phillips* v. *Miller*, L. R. 9 C. P. 196, reversed on appeal, L. R. 10 C. P. 420; and see *Caballero* v. *Henty*, L. R. 9 Ch. App. 447; and *vide suprà*, p. 452.

(*c*) *Clermont* v. *Tasburgh*, 1 Jac. & W. 112.

(*d*) *Twining* v. *Morrice*, 2 Bro. C. C., see 331.

(*e*) *Anon.*, Sug. 301; and see and consider *Bartlett* v. *Salmon*, 1 Jur. N. S. 277; 6 De G. M. & G. 33.

(*f*) *Ibid.*

(*g*) If he rely on want of title as a defence he should not file a cross bill to have the contract rescinded; *Hilton* v. *Barrow*, 1 Ves. J. 284.

varying from that to which he is entitled under the contract; e.g., he will not be compelled to take a term (even for 4000 years) (*h*), or a copyhold (*i*) for a freehold, or mere sheep-walks for a freehold (*k*), or enfranchised copyhold for a freehold, where the rights of the lord in respect of minerals are reserved (*l*).

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purchaser declining abatement.

When estate is of different tenure;

So also the purchaser may resist specific performance on the ground of the property being held in a manner different from that which is expressed or implied in the contract; e. g., he will not be compelled to take an assignment of an underlease, instead of an original lease (*m*); or of a redeemable, instead of an absolute interest (*n*); or of an improved, instead of a ground rent (*o*); or of a ground rent to which the remedies of a reversioner are not incident (*p*): or on the ground of no title being shown to that extent of interest which he contracted for; e.g., he cannot be compelled to take, instead of an estate in possession, a reversion expectant on a life estate (*q*), or on a subsisting, or, *à fortiori*, a reversionary lease (*r*); or a life estate, and (subject to an intervening estate tail) the remainder in fee, instead of the fee simple in possession (*s*): nor, having contracted for the entirety, can he be compelled to take undivided parts of the estate (*t*), even although the vendors were tenants in common of the entirety (*u*): and the same

or held in different manner;

or no title shown to extent of interest contracted for;

(*h*) *Drewe* v. *Corp*, 9 Ves. 368; and see *Fordyce* v. *Ford*, 4 Bro. C. C. 494, cited 13 Ves. 78; *Wright* v. *Howard*, 1 Sim. & St. 190; *Price* v. *Ley*, 4 Giff. 235.

(*i*) *Twining* v. *Morrice*, 2 Bro. C. C., see p. 331; *Hick* v. *Phillips*, Prec. C. 575; Sug. 303; *Ayles* v. *Cox*, 16 Beav. 23; unless the incidents of tenure are trivial, *suprà*, p. 138.

(*k*) *Vancouver* v. *Bliss*, 11 Ves. 458; see p. 446.

(*l*) *Upperton* v. *Nickolson*, L. R. 6 Ch. Ap. 436.

(*m*) *Madeley* v. *Booth*, 2 De G. & S. 718; Sug. 300; *sed vide suprà*, p. 127; and see *Hayford* v. *Criddle*, 22 Beav. 480.

(*n*) *Coverley* v. *Burrel*, Sug. 340.

(*o*) *Stewart* v. *Alliston*, 1 Mer. 26.

(*p*) *Langford* v. *Selmes*, 3 K. & Jo. 220; see too *Smith* v. *Watts*, 4 Drew. 338.

(*q*) *Collier* v. *Jenkins*, You. 295; *Hughes* v. *Jones*, 3 De G. F. & Jo. 301; 8 Jur. N. S. 399.

(*r*) *Lincham* v. *Cotter*, 7 Ir. Eq. 176; Sug. 304.

(*s*) Sug. 308.

(*t*) *Dalby* v. *Pullen*, 3 Sim. 29; affirmed, 1 Russ. & M. 296; see *Price* v. *Griffith*, 1 De G. M. & G. 80, C. A.

(*u*) *Att.-Gen.* v. *Day*, 1 Ves. 218, 224.

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decision has been come to, where, on a contract for two-sevenths of an estate, a title could only be made to one-seventh (*x*); nor can he, on the purchase of a leasehold interest, be compelled to accept a term "considerably less" (*y*) than that contracted for; *e.g.*, a term for six instead of sixteen years (*z*); nor, according to a decision of Lord Romilly, a term falling only a little short of the term contracted for, as a term of twenty years and a quarter instead of twenty-one years (*a*). Or on the ground of no title being shown to a material part of the estate; such materiality consisting, either in the proportion which such part bears to the entirety, or in its being important with regard to the enjoyment of the residue, or as possessing an adventitious value in the estimation of the purchaser (*b*): *e.g.*, "a purchaser cannot be compelled to take compensation for a large portion of the estate" (*c*); as, where the property was stated to contain 753 square yards or thereabouts, but in fact contained only 573 square yards (*d*); so, in the case of building land, a deficiency inconsiderable as regards actual quantity may be material by reason of its interfering with the profitable user of the land for building purposes; as when the deficiency exists mainly in the frontage measurement. Nor, having entered into a single contract for two estates, could the purchaser probably be compelled to take one without the other (*e*), although the estate with the defective title were let upon and sold subject to a fee-farm grant at a large rent (*f*): so where on the purchase of a mansion and 700 acres, the title to 12 acres proved defective, such 12 acres being opposite the park gates and containing

or no title shown to material part of estate;

or to one of two estates included in a single contract;

(*x*) *Roffey* v. *Shallcross*, 4 Mad. 227; cited 2 Myl. & K. 726.

(*y*) Sug. 299; see *Mortlock* v. *Buller*, 10 Ves. 306; *Halsey* v. *Grant*, 13 Ves. 77, 78; *Vignolles* v. *Bowen*, 12 Ir. Eq. 194, 198.

(*z*) *Long* v. *Fletcher*, 2 Eq. Ca. Abr. 5.

(*a*) *Forrer* v. *Nash*, 35 Beav. 167; *sed quære*.

(*b*) See 1 Mad. 167; and 13 Ves. 79; *Magennis* v. *Fallon*, 2 Moll. 588; *Stewart* v. *Marq. Conyngham*, 1 Ir. Ch. R. 534, 573.

(*c*) Sug. 316.

(*d*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; in which case there was a condition that no compensation should be allowed for misdescription; and *vide suprà*, pp. 648, 653.

(*e*) See *Prendergast* v. *Eyre*, 2 Hog. 81.

(*f*) See S. C., p. 94; Sug. 313, 315; *sed quære*.

brick earth, which rendered it probable that they might be built upon, the purchaser was held free (g): so, also, where, on the purchase of a wharf and jetty, no title could be made to the jetty (h): so where no title could be made to a strip of land forming the frontage to the highway (i). So, he may resist specific performance on the ground of the existence of incumbrances or liabilities which would interfere with the enjoyment of the estate; *e.g.*, liabilities to tithe (if the estate is sold as tithe free or subject to a modus or commuted rent-charge (k)), to rights of mining (l), common (m), or waterway with power of entry for the purpose of making, opening, or cleansing water-courses, or to rights of entry for making reservoirs, or of planting ladders for the repair of adjoining houses (n), or to a right of sporting (o), or to the repairs of the chancel of a church (p), or to quit-rents or rent-charges, if of a large amount (q), or to keep up the fences, water-courses, &c., upon the land itself (r), have been held to be defects which do not admit of compensation.

or where incumbrances or liabilities exist which would affect its enjoyment;

(g) *Knatchbull* v. *Grueber*, 1 Mad. 153; 3 Mer. 124, see 141; and see 2 Myl. & K. 728.

(h) *Peers* v. *Lambert*, 7 Beav. 546; and see 6 Ves. 678; 13 Ves. 78; Sug. 316; where earlier decisions of a contrary tendency have been disapproved of.

(i) *Perkins* v. *Ede*, 16 Beav. 193.

(k) *Ker* v. *Clobery*, Sug. 32; *Bincks* v. *Lord Rokeby*, 2 Sw. 222. The question of tithe free, or not, has been said to be a question of fact and not of title; *Wallinger* v. *Hilbert*. 1 Mer. 104; *Smith* v. *Lloyd*, 2 Sw. 224, n.; *sed qu.*, whether this statement, although theoretically accurate, is correct for practical purposes. Freedom from the tithe is a fact which does not relate to the physical condition of the property, and must, nevertheless, be proved by the vendor before he can be said to have shown a good title to the estate as described in the contract.

(l) See *Seaman* v. *Vawdrey*, 16 Ves. 390; Sug. 312; *Martin* v. *Cotter*, 3 J. & L. 496, 509; *Hayford* v. *Criddle*, 22 Beav. 480; *Ramsden* v. *Hirst*, 4 Jur. N. S. 200; *Kerr* v. *Pawson*, 25 Beav. 394; *Pretty* v. *Solly*, 26 Beav. 606; and see *Upperton* v. *Nickolson*, L. R. 6 Ch. Ap. 436. See now 21 & 22 Vict. c. 94, by which the 11th section of 15 & 16 Vict. c. 51, is repealed.

(m) See last note.

(n) See *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609, where only about four and a half out of thirty acres contracted for were subject to the easements.

(o) See *Burnell* v. *Brown*, 1 Jac. & W. 172; Sug. 311.

(p) *Forteblow* v. *Shirley*, cited 2 Sw. 223.

(q) *Portman* v. *Mill*, 1 Russ. & M. 696.

(r) *Larkin* v. *Lord Rosse*, 10 Ir. Eq. 70. See as to a charge on a living in favour of Queen Anne's Bounty not entitling a purchaser to

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or matters exist which increase proposed liability of purchaser;

Upon a similar principle, it has been held, at Law, that a purchaser having contracted for the assignment of a subsisting lease, cannot be required to accept a new lease as original lessee: his liability being greater under the lease than it would be under the assignment (s). So, where, on the purchase of leaseholds, the lease was found to contain covenants to build additional houses, and to deliver them up at the end of the term, and the houses had not been built, but the covenant to build had been waived, it was held that the liability under the covenant to deliver up at the end of the term was a sufficient defence to the suit: although such liability might have been escaped by assigning the term to a pauper even only a day before its termination (t).

or which affect the enjoyment of material part of property.

Where only part of an estate is affected by a liability which, if affecting the entirety, would enable the purchaser to resist specific performance, the purchaser's right to avoid the contract would seem to depend upon whether the part so affected is material to the enjoyment of the residue. Where the part so affected is not material to such enjoyment, and is not the purchaser's principal object in purchasing, he may, it seems, be compelled to take the remainder of the land at a proportionate price; but, in such a case, there will be a reference to chambers to inquire as to the materiality of the part to which a title cannot be made (u).

Defect in title to one of several lots, how far defence in respect of remaining lots.

Where, on the purchase of several lots by the same person, the title to one or more proves defective, this may or may not, according to circumstances, be a ground for the purchaser's resisting specific performance in respect of the remaining lots. An express agreement that the purchaser shall not take any unless he can have all, will be sufficient

compensation, *Edwards-Wood* v. *Marjoribanks*, 1 Giff. 384; 3 De G. & Jo. 329; 7 H. L. Ca. 806.

(s) *Mason* v. *Corder*, 2 Marsh. 332; see Sug. 300, where the case seems to be cited doubtfully: but the principle seems a sound one; and see *Darlington* v. *Hamilton*, Kay, 558; *Bartlett* v. *Salmon*, 1 Jur. N. S. 277; 6 De G. M. & G. 33; *Hayford* v. *Criddle*, 22 Beav. 477.

(t) *Nouaille* v. *Flight*, 7 Beav. 521.

(u) Sug. 315.

to blend the whole into one contract; "but the same complication may be effected, or rather evidenced, without any such agreement. It is a question of circumstances: the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion by the party, a mere statement of his inclination or fancy, will not be sufficient: nor may the proof of anything of a private nature, not known to the vendor, suffice: but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all (*x*).

Benefit of defence, how lost to purchaser.

A purchaser will lose his right to resist specific performance and his right to compensation or abatement (*y*) on the ground of the estate being of a different tenure (*z*), or subject to a liability affecting its beneficial enjoyment (*e.g.*, a right of sporting (*a*)), or of there being no title to a material part of it (*b*), or of a variation from the description in the particulars (*c*), if, at the time of entering into the contract, he had, or by using due diligence might have had, knowledge of the defect (*d*); or if, after having become acquainted with it, he, without insisting thereon, proceed in the treaty (*e*); or, *à fortiori*, take possession (*f*); so if, although insisting on the objection he take possession and endeavour to prevent

(*x*) *Per* Lord Brougham, *Casamajor* v. *Strode*, 2 Myl. & C., see judgment p. 725; *Poole* v. *Shergold*, 2 Bro. C. C. 118; Lord Eldon's remarks in *Drewe* v. *Hanson*, 6 Ves. 675, as stated Sug. 320; *Lewin* v. *Guest*, 1 Russ. 325.

(*y*) See *Horner* v. *Williams*, 1 J. & C. 274.

(*z*) *Fordyce* v. *Ford*, 4 Bro. C. C. 494; *sed vide suprà*, p. 1073.

(*a*) *Burnell* v. *Brown*, 1 Jac. & W. 168.

(*b*) See *Drewe* v. *Hanson*, 6 Ves. 679; *Martin* v. *Cotter*, 3 J. & L. 508.

(*c*) *Dyer* v. *Hargrave*, 10 Ves. 505, 508.

(*d*) *James* v. *Lichfield*, L. R. 9 Eq. 51; case of notice of a tenancy being notice of a tenant's equities as between vendor and purchaser; as to which see now *Caballero* v. *Henty*, L. R. 9 Ch. Ap. 447, and *vide suprà*, pp. 452, 1072.

(*e*) 4 Bro. C. C. 498; 6 Ves. p. 679; 10 Ves. 508; *Kingsley* v. *Young*, 17 Ves. 468; 18 Ves. 207; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602.

(*f*) 1 Jac. & W. 168.

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the vendor from removing the defect, or even proceed in the treaty, he may be compelled to complete with an abatement (*g*): so, when a railway company agreed to buy from a tenant for life an estate not within their special Act, and to procure an Act enabling him to convey the fee, which they failed to do, they were ordered to pay the entire purchase-money into Court upon his conveying his life estate (*h*).

Defects in title, not available as a defence to purchaser: limited right of common; small quit-rents or rents-charge:

And a purchaser has not been allowed to resist specific performance on the ground that the estate having been sold with what was represented in general terms as an unlimited right of common, the same proves to be a right of common only for sheep (*i*); or on the ground of the estate being subject to quit-rents or rent-charges of small amount (*k*); or of a slight misdescription of the vendor's interest on a sale of leasehold (*l*), or quit-rents (*m*), or a want of title to immaterial (*n*) portions of the estate.

tithe—when the freedom from tithe was no part of inducement to purchase;

So, where on the sale of 140 acres, the particulars stated that about 32 acres were tithe-free, and no evidence of exemption could be produced, Lord Eldon held that the right to the tithe of this part of the property could not be considered the inducement to the purchase; and decreed

(*g*) See *Calcraft* v. *Roebuck*, 1 Ves. jun. 221.

(*h*) *Hawkes* v. *Eastern Counties R. Co.*, 3 De G. & S. 743; 1 De G. M. & G. 737; 5 H. L. C. 331.

(*i*) *Howland* v. *Norris*, 1 Cox, 59; but suppose the known object of the purchaser in buying had been to breed horned cattle or horses?

(*k*) See *Esdaile* v. *Stephenson*, 1 Sim. & St. 122; *Portman* v. *Mill*, 1 Russ. & M. 696; *Wood* v. *Bernal*, 19 Ves. 221; *Prendergast* v. *Eyre*, 2 Hog. 81, 94, and see Lord St. Leonards' remarks (V. & P. 313), disapproving of the decision in *Howland* v. *Norris*, *ubi suprà*, that a tithe rent-charge of 14*l*. *per annum* was a matter for compensation. As to a misstatement of the amount of ground rent on the sale of a lease, see *Pope* v. *Garland*, 4 Y. & C. 394. It may be remarked that, in the absence of any statement on the subject, the existence of a tithe-commutation rent-charge, or of tithe, must be presumed, and is no objection to the tithe, nor ground for claiming compensation; see Sug. 322.

(*l*) See cases cited *suprà*, p. 1074; but see also *Forrer* v. *Nash*, 35 Beav. 167.

(*m*) *Cuthbert* v. *Baker*, Sug. 313.

(*n*) *M'Queen* v. *Farquhar*, 11 Ves. 467; *Bowyer* v. *Bright*, 13 Pri. 698, 704; *suprà*, p. 1074; *Stewart* v. *Marquis Conyngham*, 1 Ir. Ch. R. 573.

specific performance with an abatement (*o*). So, where the purchaser's agent having by letter agreed to purchase an estate, consisting of a house and nineteen acres of land, twelve of which were occupied by the house, offices, garden, and pleasure grounds—no mention being made of tithes—and on a more formal contract being prepared, the great tithes were inserted by the purchaser's solicitor, but without any increase of price or further treaty on the subject, and no title could be made to the tithes, Sir J. Leach held that the tithe could have formed no part of the inducement to the contract, and decreed specific performance with an abatement (the same having been offered by the vendor (*p*)).

Upon the last case, we may, however, remark, that the purchaser's agent appears to have actually entered by letter into a binding agreement to purchase subject to the tithe. It may also be observed that a liability to the render of tithe in kind constitutes an objection of a very different character from that which arises from the existence of a mere pecuniary liability of defined amount.

existence of footway.

So, the circumstance of the estate being subject to a footway over and round it, has been held to be no defence to a suit for specific performance; its existence being patent, and the purchaser having made no inquiry on the subject (*q*). But the decision has not been generally approved (*r*): and the Courts would probably upon slight grounds come to a different decision in any case where an estate was subject to a right of way which materially affected its enjoyment.

5th—Matters relating to consideration.

As to the 5th of the above heads.—The amount of the consideration to be paid may be a ground of defence by

(*o*) *Bincks* v. *Lord Rokeby*, 2 Sw. 222.

(*p*) *Smith* v. *Tolcher*, 4 Russ. 302.

(*q*) *Oldfield or Bowles* v. *Round*, 5 Ves. 508; and see *Davies* v. *Sear*, L. R. 7 Eq. 429, where the fact of a house on a building estate only partially covered with houses, being erected over an open gateway was held to be notice that a right of way through it was reserved; and *vide suprà*.

(*r*) See Sug. 328; but see also *contrà*, *Martin* v. *Cotter*, 3 J. & L. 506.

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either party: and its inadequacy, or excess, will, of course, be determined with reference to matters as existing at the date of the contract, irrespectively of subsequent events (s).

Inadequacy of, when a vendor's defence.

Inadequacy of consideration is not, however, a defence available to the vendor of an estate in possession (t), unless it can be shown to have originated in fraud, surprise, or misrepresentation (whether wilful or not (u)), or improper concealment on the part of the purchaser (x), or in advantage taken of the distress of the vendor (y), or according to Lord Eldon, "unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction" (z);—but this *dictum* would probably at the present day be hardly sustained in its full extent (a);—or unless the vendor be a trustee for sale (b): but even in the case of a trustee the Court will enforce against him an agreement to sell at a fair specified price, although a much larger sum may have been subsequently offered and accepted (c).

On sale of a reversionary interest;

The distinction which for a long time existed between the purchase of an interest in possession, and of a reversionary interest, as respects mere inadequacy of price being an available defence for the vendor, has, as we have already seen (d), been removed by a recent Statute; which provides that no purchase made *bonâ fide*, and without fraud or unfair

(s) See Sug. 273; *Poole* v. *Shergold*, 2 Bro. C. C. 118, 119; *Coles* v. *Trecothick*, 9 Ves. 246; *suprà*, p. 754.

(t) *Coles* v. *Trecothick*, 9 Ves. 246; *Burrowes* v. *Lock*, 10 Ves. 470; *Lowther* v. *Lowther*, 13 Ves. 103; *Borell* v. *Dann*, 2 Ha. 450.

(u) 1 Mad. 81; *Brealey* v. *Collins*, You. 317; and see next note.

(x) See cases cited in n. (t); also *White* v. *Damon*, 7 Ves. 30; *Western* v. *Russell*, 3 Ves. & B. 187; *Deane* v. *Rastron*, 1 Anst. 64; *Cadman* v. *Horner*, 18 Ves. 10; *Turner* v. *Harvey*, Jac. 169; *Wall* v. *Stubbs*, 1 Mad. 80; *Lukey* v. *O'Donnel*, 2 Sch. & L. 471; Sug. 274; and see Ch. III., *suprà*. See too, *Falcke* v. *Gray*, 4 Drew. 651, where the Court refused specific performance of a contract to sell articles of *vertu*, on the ground that the purchaser was well acquainted with their value, while the vendor was wholly ignorant of it.

(y) See *Martin* v. *Mitchell*, 2 Jac. & W. 413, 424; *et vide suprà*, p. 747.

(z) 9 Ves. 246; and see Jac. 282.

(a) See Sug. 275; *Vigers* v. *Pike*, 8 Cl. & F. 645.

(b) *Goodwin* v. *Fielding*, 4 De G. M. & G. 90.

(c) *S. C.*

(d) *Vide suprà*, p. 756.

dealing, of any reversionary interest in real or personal estate, is for the future to be opened, or set aside, merely on the ground of undervalue (*e*). But as in the case of an interest in possession, so *à fortiori* in the case of a reversionary interest, if the value is capable of estimation, and the price paid is so grossly inadequate as to be in itself evidence of fraud, this may be a sufficient defence to the purchaser's suit for specific performance. And a degree of inadequacy which would be insufficient to induce the Court to interfere and set aside an executed contract may be a valid defence in a suit for specific performance (*f*); especially if the contract has not been acted on, or attempted to be enforced, until the reversion has fallen into possession (*g*). **Chap. XVIII. Sect. 9.**

Sale by auction; sale of unascertained interest.

The fact of the sale being by auction, although not absolutely conclusive (*h*), much increases the difficulty of showing fraudulent inadequacy (*i*); and the fact of neither party being aware of the value of the estate at the time of the contract, seems to reduce the chance of succeeding in such a defence to a minimum; as in a case where a person sold, for what proved to be one-tenth only of its real value, the allotment to which he might be entitled under an expected Inclosure Award (*k*).

Consideration uncertain in amount—whether question of inadequacy thereby excluded.

It is laid down by Lord St. Leonards (*l*), that "if an uncertain consideration (as a life annuity) be given for an estate, and the contract be executory, Equity, it seems, will enter into the adequacy of the consideration." However, in a case (*m*) before Sir J. Wigram, V.-C., his Honor, in deciding that an inadequacy of seven or eight *per cent.* was insuffi-

(*e*) 31 Vict. c. 4; and see *Miller* v. *Cook*, L. R. 10 Eq. 641.

(*f*) See *Ryle* v. *Swindells*, M'Clel. 519; *Playford* v. *Playford*, 4 Ha. 546; *Vigers* v. *Pike*, 8 Cl. & F. 645.

(*g*) *Playford* v. *Playford*, *ubi suprà*,

(*h*) *Collet* v. *Woollaston*, 3 Bro. C. C. 228.

(*i*) *White* v. *Damon*, 7 Ves. 30, 35; *Ex parte Latham*, *ibid.* 35, n.; *Ord* v. *Noel*, 5 Madd. 440; *Borell* v. *Dann*, 2 Ha. 450.

(*k*) *Anon.*, cited 6 Ves. 24; and see *Knight* v. *Majoribanks*, 11 Beav. 322; affirmed, 2 Mac. & G. 10.

(*l*) Sug. 273; citing *Pope* v. *Roots*, 1 Bro. P. C. 370; *Mortimer* v. *Capper*, 1 Bro. C. C. 156; and *Jackson* v. *Lever*, 3 Bro. C. C. 605.

(*m*) *Bower* v. *Cooper*, 2 Ha. 408.

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cient as a defence, made observations indicating a doubt whether the older cases are to be regarded as authorities; they having been decided before the modern rule of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established: at any rate the circumstance of the contingency having turned out unfavourably to the vendor, is no ground of defence (*n*).

But although, in sales of property in consideration of a life annuity, the Court will decree specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy as to the fairness of the transaction, and require a clear case for specific performance under such circumstances (*o*).

Failure of contingent consideration, in general no defence.

We have already seen that where the estate is sold for a contingent consideration, *e. g.*, a life annuity, the occurrence of the contingency which determines the consideration, is, in general, no defence to the purchaser's suit for specific performance (*p*).

Excess of purchase-money, when a purchaser's defence.

So, on the other hand it has been held that the mere excessive (*q*) amount of the purchase-money (even although not attributable to fraud, misrepresentation, or concealment on the part of the vendor (*r*), is a defence available to a purchaser (*s*): and Lord St. Leonards remarks that "few contracts can be enforced in Equity where the price is unreasonable, because contracts are not often strictly observed by either party: and if an unreasonable contract be not performed by the vendor, according to the letter in

(*n*) *Coles* v. *Trecothick*, 9 Ves. 246; *Kenney* v. *Wexham*, 6 Madd. 355.

(*o*) *Per* Lord Cottenham, C., in *Davies* v. *Cooper*, 5 Myl. & C. 279; and see *Valentine* v. *Dickenson*, 7 Jur. N. S. 857; *Baker* v. *Monk*, 10 Jur. N. S. 691.

(*p*) *Suprà*, p. 250, *et vide* p. 1081.

(*q*) At the date of the contract; see *Poole* v. *Shergold*, 2 Bro. C. C. 119.

(*r*) Which, if proved, would of course be a bar to specific performance; *Buxton* v. *Lister*, 3 Atk. 386; *Shirley* v. *Stratton*, 1 Bro. C. C. 440.

(*s*) *Day* v. *Newman*, cited 10 Ves. 300; *Squire* v. *Baker*, 5 Vin. Ab. 549; *Abbott* v. *Sworder*, 4 De G. & S. 448.

every respect, Equity will not compel a performance *in specie*" (*t*). Chap. XVIII. Sect. 9.

Remarks on the doctrine.

It is, however, submitted, that such a defence by a purchaser deserves but little favour in a Court of Equity. There is a great difference between proofs of inadequacy and of excess of price. Inadequacy can be ascertained by reference to an extrinsic standard: *viz.*, the general market value of similar property; and there is no difficulty in comparing money with money: but the Court when required to pronounce a price excessive, is called upon to do what it has, apparently, no satisfactory means of doing: *viz.*, to determine what represents the money value, to a specified individual, of a specified estate. There is no extrinsic standard by which such value can be certainly determined. The mere fact of the contract having been entered into, knowingly and *boná fide*, may, it is conceived, be not unreasonably considered in itself to determine the real value of the estate, to the purchaser, at the time of the contract: whatever may be its value to third persons, and however much its value to the purchaser himself may have been altered by subsequent events (*u*).

Where the property is of uncertain value, as *e.g.*, a mine.

Where the subject-matter of the contract is property of a speculative description, as, *e.g.*, a mine, which may or may not turn out profitable, the excessive amount of the purchase-money can seldom be an available defence to the purchaser (*x*): and it may be doubted whether the Court ought in any case, on the mere ground of the hardship of the bargain, to withhold relief from the vendor; if the circumstances, which are relied on as constituting the hardship, may be supposed to have been present to the mind of the defendant, at the time of his entering into the contract (*y*).

(*t*) Sug. 273.

(*u*) See *Adams* v. *Weare*, 1 Bro. C. C. 567; *Cockell* v. *Taylor*, 15 Beav. 115.

(*x*) See *Haywood* v. *Cope*, 25 Beav. 140; where a contract to purchase a colliery, which proved to be worthless, for 1400*l.*, was forced on the purchaser; *Ridgway* v. *Sneyd*, Kay, 627.

(*y*) See *Webb* v. *London and Portsmouth R. Co.*, 9 Ha. 140; reversed, 1

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Purchase connected with loan.

Where a contract for purchase is complicated with, and forms a subordinate part of an agreement for, a loan to the purchaser, the latter has evidently a ground of defence which does not exist in ordinary cases (z).

Future consideration which cannot be enforced.

Where the consideration moving from one party to the contract, consists of something to be done at a future time, and which the Court could not enforce, it will not decree specific performance against the other party (a).

When price fixed by valuation.

When the price is to be fixed by valuation or arbitration (b), the decision of the valuer, arbitrators, or umpire is generally conclusive on the question of value (c); and, in the absence of fraud or mistake, the Court will not interpose on the mere ground that the price awarded is exorbitant (d); but the misbehaviour, or mere negligence, of the valuers may afford grounds for the Court's refusal to enforce a contract (e) which is not regarded with much favour (f).

6th—Conduct of plaintiff after contract—when a defence.

As to the sixth of the above heads: comprising those grounds of defence which consist of matters relating to the conduct of the plaintiff subsequent to the contract: these may be conveniently treated of with reference to—

Release of, waiver of, or delay to enforce the contract.

1st. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has released, expressly waived, or improperly delayed to enforce, his rights under the contract.

Conduct of plaintiff.

2ndly. Cases, where the defence is, that the plaintiff has, by his conduct, in respect of the estate, or towards the other party, forfeited his rights under the contract.

De G. M. & G. 521; *Hawkes* v. *E. C. R. Co.*, 1 De G. M. & G. 754; 5 H. L. Ca. 331; and see judgment in *Ridgway* v. *Sneyd*, Kay, 635.

(z) *Cockell* v. *Taylor*, 15 Beav. 103.

(a) *Waring* v. *Manchester, &c., R. Co.*, 7 Ha. 492; *Blackett* v. *Bates*, L. R. 1 Ch. Ap. 117.

(b) As to ascertaining the price by arbitration, *vide suprà*, p. 221.

(c) *Belchier* v. *Reynolds*, 2 Ken. pt. 2, 87, 91; *Emery* v. *Wase*, 5 Ves. 846; 8 Ves. 505, 517.

(d) *Collier* v. *Mason*, 25 Beav. 200.

(e) *S. C., et vide suprà*, p. 221, *Eads* v. *Williams*, 4 De G. M. & G. 674.

(f) See 5 Ves. 849.

3rdly. Cases, where the defence is, that the plaintiff (whether the vendor or purchaser) has already chosen his remedy, and obtained satisfaction for the alleged breach of contract.

Election of other remedy for breach of contract.

As to the first class of cases.—An actual release by deed, or a mere written waiver of the contract, will, of course, be a good defence in Equity: so will a mere parol waiver (*g*); "but such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into" (*h*): and Lord St. Leonards remarks, that "the Court will look at the evidence with great jealousy" (*i*): and has held, judicially, that there must be as clear evidence of the waiver as of the existence of a contract (*k*) and the abandonment of the contract by one of several purchasers is no defence to a suit by his co-purchasers (*l*). Whether a parol waiver of a written contract was a sufficient defence at Law, was at one time considered doubtful; but now, as we have seen, mere equitable defences may be made available at Law (*m*).

Release, waiver of, or delay to enforce the contract.

We have already considered (*n*) how far time is in Equity of the essence of the contract: even, however, where a clear right has existed to enforce the contract, such right may be lost by delay in resorting to the Court; *e.g.*, an unexplained delay of seven years (*o*), in another of six years (*p*), and, in

What delay in filing a bill a defence.

(*g*) See *Pitcairn* v. *Ogbourne*, 2 Ves. S. 376; *Morris* v. *Timmins*, 1 Beav. 411; *Dawson* v. *Yates*, *ib.* 301.

(*h*) *Per* Lord Lyndhurst, in *Robinson* v. *Page*, 3 Russ 114, 119; and see *Price* v. *Dyer*, 17 Ves. 364.

(*i*) Sug. 168.

(*k*) *Carolan* v. *Brabazon*, 3 J. & L. 200; as to the alteration of an agreement by either party, *vide suprà*, p. 236.

(*l*) *Hood* v. *Pimm*, 1 C. P. C., N. R. 280.

(*m*) As to effect at Law of a parol variation of a written contract, see *Noble* v. *Ward*, L. R. 1 Exch. 117; L. R. 2 Exch. 135.

(*n*) *Suprà*, Ch. X., and as to a mere option of purchase, *vide suprà*, p. 208.

(*o*) *Milward* v. *Earl of Thanet*, 5 Ves. 720, n.; and see *South E. R. Co.* v. *Knott*, 10 Ha. 122.

(*p*) *Harrington* v. *Wheeler*, 4 Ves. 686.

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another case of four years and eight months (*q*), and in another of three years (*r*), in filing the bill, has in itself been considered a sufficient answer to the suit. Where the bill was filed within fourteen months after a correspondence upon objections to the title had ceased, by the defendants returning no answer to the last letter which called for a distinct answer and threatened to file a bill, specific performance was decreed: the Court observing, that one could easily imagine that circumstances might have happened which would have made it peevish to file the bill immediately (*s*).

Less time allowed where there is a refusal to perform the contract.

Less time, however, will in general be allowed when the defendant has expressly refused, than when he merely tacitly neglects, to perform the agreement (*t*): in cases of the former description, periods of delay, varying from two years and a half (*u*) to twelve months (*x*), have been held sufficient to bar the relief (*y*): it does not, however, appear, that time will run against the plaintiff so long as the question of completion remains under discussion (*z*): or while he is substantially in possession of the benefit contracted for (*a*): as *e.g.*, where under a contract for a lease, possession was taken, and rent paid for several years (*b*).

(*q*) *Alley* v. *Deschamps*, 13 Ves. 225.

(*r*) *Firth* v. *Greenwood*, 1 Jur. N. S. 866, V.-C. Wood.

(*s*) *Marquis of Hertford* v. *Boore*, 5 Ves. 719.

(*t*) See *Haywood* v. *Cope*, 25 Beav. 140, 150.

(*u*) *Stewart* v. *Smith*, 6 Ha. 222, n.; and see *Eads* v. *Williams*, 4 De G. M. & G. 674.

(*x*) *Watson* v. *Reid*, 1 Russ. & M. 236.

(*y*) See *Heaphy* v. *Hill*, 2 Sim. & St. 29, about two years' delay; *Walker* v. *Jeffreys*, 1 Ha. 341, two years; *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213, nineteen months; *Moore* v. *Marrable*, L. R. 1 Ch. Ap. 217, five years.

(*z*) See *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213; and *Moxhay* v. *Inderwick*, 11 Jur. 837, where a correspondence upon the shape of the conveyance was carried on at considerable intervals for nearly four years; and see *Gee* v. *Pearse*, 2 De G. & S. 325, 346, where V.-C. K. B. remarked that a purchaser not ready with the price according to the contract, ought to show a very special case for the interference of the Court against the vendor. See too, *Colby* v. *Gadsden*, 34 Beav. 416.

(*a*) *Clarke* v. *Moore*, 1 J. & L. 723; and see *Hersey* v. *Giblett*, 18 Beav. 174. But delay will be material on the question of costs: see *Burke* v. *Smyth*, 3 J. & L. 193; *Fleetwood* v. *Green*, 15 Ves. 594; *King* v. *King*, 1 My. & Ke. 442.

(*b*) *Sharp* v. *Milligan*, 22 Beav. 606.

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Tendency of modern decisions as to delay.

The modern tendency of the Court, however, has been to require the plaintiff to be prompt in seeking his equitable remedy (*c*): and relief will be more readily refused on the ground of delay if the contract were originally (*d*), or have by subsequent events become (*e*), a hard one: or if he have acted vexatiously (*f*), or have entered into the contract without present means of performing it (*g*): or where the matter has not merely slept, but the defendant has actually refused to complete (*h*); or where the plaintiff has acted in reference to the estate in a manner inconsistent with the existence of the contract (*i*); or where the property is of fluctuating value (*k*). In the case of an agreement for a lease, it could be only under very special circumstances, if at all, that the Court would enforce specific performance after the stipulated term had expired (*l*).

Waste of estate, when a defence;

As to the second class of cases.—We have already seen that any act by the vendor—*e.g.*, the felling of ornamental timber—which prevents his giving to the purchaser that which was substantially the subject-matter of the contract, will be a defence to his suit for specific performance (*m*); but that he may, in due course of husbandry, cut coppice, and get in crops, accounting to the purchaser for the net profits received subsequently to the time at which according to the contract they are to belong to the purchaser in the event of the sale being completed (*n*).

or ejectment of purchaser.

So, the circumstance of the vendor having turned the

(*c*) *Southcomb* v. *Bishop of Exeter*, 6 Ha. 213; see *Nunn* v. *Truscott*, 3 De G. & S. 304: and *Parkin* v. *Thorold*, 16 Beav. 59, 62.

(*d*) *Suprà*, p. 1052.

(*e*) See *Alley* v. *Deschamps*, 13 Ves. 225, 230.

(*f*) See *Spurrier* v. *Hancock*, 4 Ves. 667; *Pope* v. *Simpson*, 5 Ves. 145.

(*g*) See *Gee* v. *Pearse*, 2 De G. & S. 346.

(*h*) *Guest* v. *Homfray*, 5 Ves. 818.

(*i*) See *Chambers* v. *Betty*, Beat. 488.

(*k*) *Pollard* v. *Clayton*, 1 Kay & J. 462; *Lloyd* v. *Wilkes*, 2 Eq. R. 1081; *Macbryde* v. *Weekes*, 22 Beav. 533; *Haywood* v. *Cope*, 25 Beav. 140; *Alloway* v. *Braine*, 26 Beav. 575.

(*l*) See *Nesbitt* v. *Myer*, 1 Sw. 223; *Walters* v. *Northern Coal Co.*, 2 Jur. N. S. 1; 5 De G. M. & G. 629; *De Brassac* v. *Martyn*, 11 W. R. 1020.

(*m*) *Suprà*, p. 248.

(*n*) *Ibid.*

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rightfully in possession.

purchaser out of possession (which he was entitled to under the contract, and had been allowed to take), has been held a sufficient defence to the vendor's suit (*o*).

In the case just cited the purchaser had stipulated for immediate possession, which was not to be deemed an acceptance of the title; and the decision has been held not to apply to a case where a purchaser is, under the common condition, let into possession on the day fixed for completion, but pays no portion of his purchase-money, nor any interest upon it: under such circumstances a vendor may resume possession—as, *e. g.*, by giving the tenants notice not to pay rent to the purchaser—without showing an intention to abandon his contract, or forfeiting his right to enforce it (*p*).

Or inability of vendor to perform a material stipulation under the contract.

So, if the plaintiff refuse or be unable to perform a material stipulation under the contract (*q*)—as if it had been agreed that the vendor should become tenant of the estate for a term of fourteen years at a specified rent, and he become insolvent (*r*); or that he should procure the unqualified withdrawal of a restrictive covenant and he fail to do so (*s*)—this may be a reason for refusing specific performance against the purchaser; but this defence was overruled when the agreement was for merely a yearly tenancy, and especially as the vendor's embarrassments were known to the purchaser (*t*).

Or act of forfeiture by purchaser.

So, where a party in possession under an agreement for a lease, has done acts which would, had the lease been actually granted, have clearly entitled the lessor to re-enter for a

(*o*) *Knatchbull* v. *Grueber*, 3 Mer., see 144.

(*p*) *Colby* v. *Gadsden*, 34 Beav. 416; 11 Jur. N. S. 760.

(*q*) See *Hunter* v. *Daniel*, 4 Ha. 433; *Counter* v. *Macpherson*, 5 Moo. 83. And see, as to the rule that "he who comes for Equity must do Equity," *Harrison* v. *Keating*, 4 Ha. 1; *Gibson* v. *Goldsmid*, 1 Jur. N. S. 1; 5 De G. M. & G. 757.

(*r*) See 1 Y. & C. 228; *Neale* v. *Mackenzie*, 1 Ke. 473.

(*s*) *Reeves* v. *Greenwich Tanning Co.*, 2 H. & M. 54.

(*t*) *Lord* v. *Stephens*, 1 Y. & C. 222, 228; *sed. qu.* whether the length of the tenancy is material; see Sug. 297.

forfeiture, specific performance at the suit of the former will be refused (*u*). And where there is a conflict of evidence as to whether there has been such a breach as will create a forfeiture, or as to whether it has been waived by receipt of subsequent rent, or otherwise, the Court, in decreeing specific performance, will direct the lease to bear date prior to the alleged breach, so as to give the lessor the opportunity of proceeding by ejectment or action of covenant: the lessee being put upon an undertaking to admit, in any such action, that the lease was executed on the day it bears date (*x*). Chap. XVIII. Sect. 9.

Action brought and damages recovered.

As to the third class of cases.—If the plaintiff has brought an action at Law and has recovered damages for breach of contract, he will be held to have elected his remedy (*y*): and the same rule, it is conceived, will apply when law and equity are administered concurrently under the Judicature Act, 1873.

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As to the proceedings in the suit, &c.

(10.) *As to the proceedings in the suit;*—viz., *payment of purchase-money into Court;—reference of title and proceedings thereon;—decree for plaintiff;—conveyance;—decree dismissing bill.*

Purchaser in possession, when ordered to pay purchase-money into Court.

Where the purchaser is in possession of the estate, he may (*z*), even before answer (*a*), be ordered upon motion to pay the purchase-money into Court. This relief, it seems, will be afforded, when "the possession by the purchaser, without payment of the purchase-money, is contrary to the

(*u*) *Gregory* v. *Wilson*, 9 Ha. 683; *Nunn* v. *Truscott*, 3 De G. & S. 304; *Lewis* v. *Bond*, 18 Beav. 85; and see *Rogers* v. *Tudor*, 6 Jur. N. S. 692, and cases there cited.

(*x*) *Pain* v. *Coombs*, 3 Sm. & G. 449; 1 De G. & Jo. 34; *Lillie* v. *Legh*, 3 De G. & Jo. 204; *Rankin* v. *Lay*, 2 De G. F. & Jo. 65; *Rogers* v. *Tudor*, 6 Jur. N. S. 692; *Poyntz* v. *Fortune*, 27 Beav. 393; *Morley* v. *Clavering*, 29 Beav. 87. As to the lessee not being liable for breaches committed between the date of the lease and the time of its execution, see *Shaw* v. *Kay*, 1 Ex. 412; *Jervis* v. *Tomlinson*, 1 H. & N. 206.

(*y*) See *Sainter* v. *Ferguson*, 1 Mac. & G. 286; *Orme* v. *Broughton*, 10 Bing. 533, 538.

(*z*) *Burroughs* v. *Oakley*, 1 Mer. 52.

(*a*) *Dixon* v. *Astley*, 1 Mer. 133; *Blackburn* v. *Stace*, 6 Mad. 69.

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intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, whereby the value of the property is deteriorated; for example, cutting timber, or selling the estate" (*b*), or dealing with it in a manner contrary to former usage, or to the usual course of husbandry (*c*); so, in one case, where the purchaser in possession improved the property, but changed the tenants (*d*). So, also, against a railway company, who, without payment of the purchase-money, have entered into possession, and used the land taken, either by agreement, or under their powers of compulsory purchase, for the purposes of their undertaking (*e*).

Purchaser allowed to elect,—either to pay or vacate possession.

But, according to Lord St. Leonards, this relief will not be afforded "where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate" (*f*). This last proposition must, however, be taken subject to the following qualifications, *viz.*, that where a purchaser has been *long* in possession, *e.g.*, three years (*g*), he will be required either to give up (*h*) possession, or to pay in his purchase-money within a short date, *e.g.*, two months (*i*); and this was ordered in a case where, according to the agreement, the greater part of the purchase-money was to remain on mortgage of the estate for twelve months after the

(*b*) Sug. 230; Dan. Ch. Prac. 1612, 1613; *Dixon* v. *Astley*, *ubi suprà*; *Bonner* v. *Johnston*, 1 Mer. 366; *Cutler* v. *Simons*, 2 Mer. 103, 106; *Bramley* v. *Teal*, 3 Mad. 219; but see *Gell* v. *Watson*, *ib.* 225.

(*c*) *Osborne* v. *Harvey*, 1 Y. & C. C. C. 116.

(*d*) *Bramley* v. *Teal*, 3 Mad. 219.

(*e*) See *Pope* v. *G. E. R. Co.*, L. R. 3 Eq. 171; *Cosens* v. *Bognor R. Co.*, L. R. 1 Ch. Ap. 594.

(*f*) Sug. 231; *Gibson* v. *Clarke*, 1 Ves. & B. 500; *Clarke* v. *Elliott*, 1 Mad. 607; *Fox* v. *Birch*, 1 Mer. 105.

(*g*) *Tindal* v. *Cobham*, 2 Myl. & K. 385; *Younge* v. *Duncombe*, You. 275.

(*h*) *Clarke* v. *Wilson*, 15 Ves. 317; *Morgan* v. *Shaw*, 2 Mer. 138; but see *Bradshaw* v. *Bradshaw*, 2 Mer. 492; and *Crutchley* v. *Jerningham*, *ib.* 502, where payment was required. Where possession, having been taken by an agent in mistake, had been restored, the motion for payment was refused; *Tomlinson* v. *Manchester and Birmingham R. Co.*, 2 Rail. Ca. 104.

(*i*) *Younge* v. *Duncombe*, You. 275; as to what acts of improper ownership will deprive the purchaser of the option of giving up possession, see *Pope* v. *G. E. R. Co.*, L. R. 3 Eq. 171.

conveyance (*k*); a similar order was made, in a modern case, by Lord Langdale, although the purchaser had taken possession for the benefit of the vendor, and expressly without prejudice to any objection he might afterwards make to the title, and had retained possession for about a year and a half: and although the above proposition of Lord St. Leonards was cited in argument, his Lordship seemed to consider that, as a general rule, a purchaser could not be allowed to retain both the estate and the money (*l*); but such rule must evidently be subject to an exception when his possession can be referred to a title prior to the contract (*m*). Where the *corpus* of the property is being enjoyed, as in the case of mines (*n*), or leaseholds, this furnishes an additional argument against the purchaser.

Where contract provides for the delay, no order made.

In one case, where a railway company was let into possession under the contract, which provided that if from any cause whatever, other than the vendor's default, the purchase should not be completed in six months, the purchase-money should carry interest at an increased rate, the Court, upon the ground that the parties themselves had specially provided for the delay, refused to order payment of the purchase-money into Court, notwithstanding that three years had elapsed since the date of the contract (*o*).

Quantity of land taken when uncertain, no order made.

In a case where, according to the bill, there was a parol agreement for sale at 80*l*. per acre, with possession given of five acres, but, according to the answer, only of three acres, a motion that the purchaser should pay in the purchase-

(*k*) *Younge* v. *Duncombe*, *ubi suprà*; *sed qu.* whether the purchaser, if the point had been pressed on the Court, would not have been allowed to give his bond or covenant for the amount agreed to be left on mortgage; and see the judgment in *Clarke* v. *Elliott*, 1 Mad. 606, 607.

(*l*) *Fowler* v. *Ward*, 6 Jur. 547; and see *Adams* v. *Heathcote*, 10 Jur. 301, V.-C. E.; *Gibson* v. *Clarke*, 1 Ves. & B. 500; *Smith* v. *Lloyd*, 1 Mad. 83; *Boothby* v. *Walker*, *ib.* 197; and *Wickham* v. *Evered*, 4 Mad. 53.

(*m*) *Bonner* v. *Johnston*, 1 Mer. 366; *Freebody* v. *Perry*, G. Coop. 91.

(*n*) *Buck* v. *Lodge*, 18 Ves. 450.

(*o*) *Pryse* v. *Cambrian R. Co.*, L. R. 2 Ch. Ap. 444; and compare *Pell* v. *Northampton and Banbury R. Co.*, *ib.* 100; and see *Capps* v. *Norwich and Spalding R. Co.*, 9 Jur. N. S. 635.

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money for the five acres, or else for the three acres, was refused (*p*).

Under special circumstances, receiver appointed.

In another case, where there was a sort of mixed possession, the great proportion of it being in the purchaser, but the vendor not being entirely out of possession, and part of the purchase-money was paid, but the purchaser was in a state of insolvency, and admitted his intention to convey the estate to trustees for the benefit of his creditors, the Court appointed a receiver (*q*).

Where a railway company has entered into possession before payment of the purchase-money.

In a late case, where a railway company, by agreement with the landowner, entered into possession, and constructed part of their line over the property, but made default in payment of a bond which they had given for the purchase-money, the Court of Appeal refused on motion to restrain the company from continuing in possession until the purchase-money was paid; but intimated that the landowner might be entitled to have a receiver appointed, or the purchase-money paid into Court (*r*). In a later case, the Court, in ordering payment of the purchase-money into Court by the railway company gave leave to the landowner, in the event of its not being so paid, to apply for an injunction, or for the appointment of a receiver (*s*); and it appears to be now well settled that the vendor of land to a railway company has all the remedies of an ordinary vendor for enforcing his lien for unpaid purchase-money, even though the line may have been opened for public traffic (*t*); but until the lien is enforced by sale, the Court will not restrain the company from running trains over the

(*p*) *Benson* v. *Glastonbury Canal Co.*, 1 C. P. C., N. R. 350.

(*q*) *Hall* v. *Jenkinson*, 2 Ves. & B. 125; see the judgment, 126.

(*r*) *Pell* v. *Northampton and Banbury R. Co.*, L. R. 2 Ch. Ap. 100. See too *Munns* v. *Isle of Wight R. Co.*, L. R. 5 Ch. Ap. 414; reversing V.-C. J., L. R. 8 Eq. 653; *Lycett* v. *Stafford and Uttoxeter R. Co.*, L. R. 13 Eq. 261. See, however, *Earl St. Germains* v. *Crystal Palace R. Co.*, L. R. 11 Eq. 568.

(*s*) *Bishop of Winchester* v. *Mid-Hants R. Co.*, L. R. 5 Eq. 17.

(*t*) *Wing* v. *Tottenham and Hampstead Junction R. Co.*, L. R. 3 Ch. Ap. 740; *Walker* v. *Ware, Hadham, and Buntingford R. Co.*, L. R. 1 Eq. 195.

land (*u*). The lien does not extend to the landowner's costs of the arbitration by which the price was ascertained (*x*). Chap. XVIII. Sect. 10.

We may, in connection with the present subject, remark that the holder of a railway debenture has not a specific charge on the superfluous lands of the company, or on the proceeds of sale thereof, which entitles him to have a receiver appointed (*y*).

Or occupation rent set on estate.

Sometimes an occupation rent is set on the estate, deducting interest at 5*l*. *per cent*. on the deposit (*z*): where a yearly tenant in possession filed a bill claiming an option to purchase, the Court would only restrain an ejectment by the landlord on the terms of the tenant continuing to pay the rent, without prejudice (*a*).

Vendor plaintiff seeking injunction, when obliged to pay in deposit.

According to the present practice, where a vendor in possession has filed a bill for specific performance and to restrain the purchaser from proceeding at Law for his deposit, an injunction has in general been awarded only on the terms of paying the deposit into Court; unless his retention of the estate were the fault only of the purchaser; as where the vendor was able and willing to make a good title, and the other improperly refused to complete (*b*). But as we have already seen (*c*), when the Judicature Act, 1873, comes into operation, the equitable jurisdiction to restrain proceedings in another Court will be taken away; without prejudice, however, to the right of any Court to direct a stay of proceedings in any cause or matter pending before it (*d*).

Injunction against

A purchaser in possession, even under the contract, but

(*u*) *Munns* v. *Isle of Wight R. Co.*, *Lycett* v. *Stafford and Uttoxeter R. Co.*, *ubi suprà*.

(*x*) *Earl Ferrers* v. *Stafford and Uttoxeter R. Co.*, L. R. 13 Eq. 524.

(*y*) *Gardner* v. *London, Chatham, and Dover R. Co.*, L. R. 2 Ch. Ap. 201.

(*z*) *Smith* v. *Jackson and Lloyd*, 1 Mad. 618.

(*a*) *Pyke* v. *Northwood*, 1 Beav. 52.

(*b*) *Wynne* v. *Griffith*, 1 Sim. & St. 147, 149.

(*c*) *Suprà*, p. 972.

(*d*) 36 & 37 Vict. c. 66, sect. 24, sub-sect. 5.

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waste by purchaser in possession.

Against exercise by vendor of his legal rights.

who has not paid his purchase-money, may be restrained on motion from waste or destruction of the property; *e.g.*, from felling timber (*e*): so the vendor may, under special circumstances, as where he has given up possession and received part of the purchase-money (*f*), be restrained from conveying away the legal estate, or contracting to re-sell the property (*g*): but it has been said that, in general, in a suit by the purchaser for specific performance he is not entitled to restrain the owner from dealing with his property; as a different doctrine would operate to control the rights of ownership, although the agreement were such as could not be performed (*h*). However, in a modern case, the authority of this *dictum* as a general statement of the law was questioned; and the rule of the Court was stated to be, that if there is a clear valid contract for sale, the Court will not permit the vendor afterwards to transfer the legal estate to a third person, even although such third person may be affected with notice of the *lis pendens*; but where the validity of the contract is open to question, or the issue of a suit for specific performance of it is doubtful, it then becomes a question of comparative convenience or inconvenience, whether the vendor shall, or shall not, be allowed to transfer the estate to a third party (*i*). After the relation of vendor and purchaser has determined by the execution of the conveyance, the Court has no jurisdiction, at the suit of the purchaser, to restrain the vendor from interfering with the property, as, *e.g.*, by vexatiously distraining on the tenants (*k*).

On sale of a next presentation.

In a suit to enforce an agreement for sale of a next presentation, the vendor may be restrained from presenting

(*e*) *Crockford* v. *Alexander*, 15 Ves. 138; *vide suprà*, p. 251.

(*f*) *Spiller* v. *Spiller*, 3 Sw. 556.

(*g*) *Echliff* v. *Baldwin*, 16 Ves. 267; *Curtis* v. *Marquis of Buckingham*, 3 Ves. & B. 168. See *Shrewsbury and Chester R. Co.* v. *Shrewsbury and Birmingham R. Co.*, 15 Jur. 548, V.-C. C.

(*h*) *Per* Lord Eldon in *Spiller* v. *Spiller*, *ubi suprà*; *Turner* v. *Wight*, 4 Beav. 40; see *Haigh* v. *Jagger*, 2 Coll. 231.

(*i*) *Per* Lord Justice Turner in *Hadley* v. *London Bank of Scotland*, 3 De G. Jo. & S. 63, 70, 71.

(*k*) *Best* v. *Drake*, 11 Ha. 369.

any clerk not nominated by the purchaser; and the injunction has even been extended so as to restrain the Bishop from presenting, except on the like nomination, or from collating in the event of a lapse pending the suit (*l*).

Reference of title on motion before hearing.

Where the question of title is the only one in dispute, the Court, in order to save time (*m*), may, at the instance of either party, direct a reference (*n*) of the title upon motion before the hearing, or even, at the instance of the plaintiff (*o*), before answer (*p*); unless the defendant's counsel can state that other matters are in question (*q*); and this, although the only question of title is one which might be conveniently determined at the hearing without a reference (*r*); or although specific performance be resisted upon the ground that time was of the essence of the contract, and that a good title was not shown within the specified period (*s*): but in a modern case where the purchaser in his answer relied on two grounds of defence, *viz.*, that the vendor could not make a good title, and that, even if he could, he had not done so within the time specified, his motion for a reference as to title, without waiving his objection as to time, was dismissed, but without costs (*t*); and the rule of the Court was stated to be that, unless the other grounds of defence are manifestly frivolous, a reference on motion will not be directed, at the instance of either party. Such an order, if obtained by the plaintiff before answer, will not preclude the defendant from making any defence which he thinks proper (*u*).

Unless contract resisted on grounds other than of title.

(*l*) *Nicholson* v. *Knapp*, 9 Sim. 326; see *Greenslade* v. *Dare*, 17 Beav. 502.

(*m*) *Dorin* v. *Harvey*, 9 Jur. 648; 15 Sim. 49.

(*n*) The reference is now to the Judge at Chambers; see 15 & 16 Vict. c. 80, ss. 32, 33, 34, and 40, and see Cons. Ord. XXXV.; Daniell Ch. Pr. 1129, *et seq.*

(*o*) See *Curling* v. *Flight*, 5 Ha. 247.

(*p*) *Balmanno* v. *Lumley*, 1 Ves. & B. 224; *Bennett* v. *Rees*, 1 Ke. 408.

(*q*) *Matthews* v. *Dana*, 3 Mad. 470.

(*r*) *Curling* v. *Flight*, 5 Ha. 248.

(*s*) *Foxlowe* v. *Amcoats*, 3 Beav. 496.

(*t*) *Reid* v. *The Don Pedro North Del Rey Gold Mining Co.*, 9 Jur. N. S. 865; and see Daniell Ch. Pr. 1129.

(*u*) *Emery* v. *Pickering*, 13 Sim. 583.

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Frivolous defence.

It is stated by Lord St. Leonards, that "in every case, where the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, the Court must first dispose of the question raised" (*x*); and according to some authorities, such question could only be disposed of upon the hearing (*y*). However, in a case where the question arose whether a defence, even although frivolous, is necessarily an answer to the motion, Sir J. Wigram, V.-C., observed, that such had not been the practice, at least since the case of *Withy* v. *Cottle* (*z*). Since the decision in that case, the practice of the Court has been to look into the answer for the purpose of seeing whether that which the defendant calls an objection to performing the contract is an open question. A point raised by the answer as an objection other than to title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and, to be in effect, frivolous; and in that case the Court does not yield to the objection by refusing the reference (*a*): but in a case before V.-C. Stuart, to which we have already referred (*b*), the Court, in refusing the purchaser's motion for a reference as to title, did not entertain the question whether his other defence to the vendor's suit, *viz.*, that the title, even if a good one, had not been deduced by the time specified, was frivolous or not.

May be disposed of on motion—*semble.*

Question of title concluded by decree.

A question of title may, in substance, be concluded by the decree, affirming the validity of the contract; and, if so, it cannot be gone into upon the reference (*c*). But in general, the question whether a good title can be made or not will not be decided by the Court, until after an inquiry has been directed.

(*x*) Sug. 352; and see cases there cited.

(*y*) See *Blyth* v. *Elmhirst*, 1 Ves. & B. 1; *Withy* v. *Cottle*, 1 Sim. & St. 174; *Gordon* v. *Ball*, 1 Sim. & St. 178.

(*z*) Turn. & Russ. 78.

(*a*) *Wood* v. *Machu*, 5 Ha., see p. 161; and see *Boyes* v. *Liddell*, 1 Y. & C. C. C. 133.

(*b*) *Reid* v. *The Don Pedro North Del Rey Gold Mining Co.*, 9 Jur. N. S. 865.

(*c*) *Wilkinson* v. *Hartley*, 15 Beav. 183.

No contract.

If the contract is pronounced not to be binding, by reason of the non-assent of parties whose concurrence was by its terms made essential to its validity, no reference will be directed as to the title, or as to whether such concurrence can be procured (*d*).

Objections to title, what are, for purposes of motion.

It has also been decided by Sir J. Wigram, V.-C., that for the purposes of such a motion, objections to the title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; *e.g.*, objections depending on the application of conditions of sale, (the propriety or validity of the conditions themselves not being questioned) (*e*); or on the liability of the vendor to furnish any particular evidence of title, or on his ability to furnish such evidence (*f*).

Order refused on ground of delay;

And since the object of granting the reference before the hearing is merely to save time, the Court has refused such a motion by a plaintiff vendor, who, for eleven months after answer, had taken no proceedings in the suit (*g*).

or waiver of title;

And, of course, no reference will be directed even at the hearing, if the Court be satisfied that the purchaser has intentionally waived his right to investigate the title (*h*): and it has been refused on the mere ground of long possession and vexatious objections on the part of the purchaser (*i*). So, an admission by the purchaser in his answer to the suit, that at the date of the contract the vendor was "entitled" to the subject-matter, has been held to be an acceptance of the title which precludes him from insisting on a reference (*k*).

acceptance of conditional

We have already seen that a purchaser who accepts a title,

(*d*) *Clay* v. *Rufford*, 5 De G. & S. 768.

(*e*) *Wood* v. *Machu*, 5 Ha. 158.

(*f*) *Curling* v. *Flight*, 5 Ha. 248.

(*g*) *Dorin* v. *Harvey*, 9 Jur. 648; 15 Sim. 49.

(*h*) *Fleetwood* v. *Green*, 15 Ves. 594; *Margravine of Anspach* v. *Noel*, 1 Madd. 310; *Burroughs* v. *Oakley*, 3 Sw., see p. 168, and earlier cases cited in argument; *Blacklow* v. *Laws*, 2 Ha., see p. 47; *Southby* v. *Hutt*, 2 Myl. & C. 207; *Bown* v. *Stenson*, 24 Beav. 631; and *vide infrà*.

(*i*) *Hall* v. *Laver*, 3 Y. & C. 191; *King* v. *King*, 1 Myl. & K. 442.

(*k*) *Phipps* v. *Child*, 3 Drew. 709.

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title—effect of.

conditionally on the vendor complying with a specified requisition, which is not complied with, is entitled to a general reference of title (*l*).

Order of reference, subject-matter and form of.

The reference, when directed, should be complete and extend to all that regards the title; but not to other matters (*m*). The order is, to inquire whether the vendor can, at the time of the reference (not at the date of the contract) show a good title (*n*); and it should contain a direction that if it shall be found that a good title can be shown, then it shall be ascertained when it was first shown; and so the order is now always made; unless, for some reason stated at the time, and by the express direction of the Court, the inquiry as to the time when a good title was first shown, be omitted (*o*); or unless the contract itself be disputed in the cause (*p*). The order may be to inquire whether a good title can be shown "subject to the conditions of sale" (*q*): but even without this qualification the inquiry will be restricted in Chambers to the deduction of a good title, having regard to the terms of the contract (*r*). So, also, an inquiry will, if desired, be directed, whether the defendant ever, and when, required of the plaintiff any, and what, evidence in proof of a point material to the title (*s*); but not as to a matter which has no reference to the title; *e. g.*, the sufficiency of the abstract delivered (*t*). The order should also contain the usual directions for the production of deeds, &c. and for the examination of the parties on oath, and reserve the further consideration of the matter (*u*), which in itself includes the question of costs.

(*l*) *Suprà*, p. 430; *Lesturgeon* v. *Martin*, 3 Myl. & K. 255.

(*m*) *Jennings* v. *Hopton*, 1 Madd. 212; *Bennett* v. *Rees*, 1 Ke. 405.

(*n*) *Langford* v. *Pitt*, 2 P. Wms. see 630; Dan. Ch. Prac. 1132.

(*o*) *Per* Lord Langdale in *Bennett* v. *Rees*, 1 Ke. 409.

(*p*) See *Gibbins* v. *N. E. M. Asylum*, 11 Beav. 1, 5; and *Keyse* v. *Haydon*, 9 Ha. App. lviii.; *Potter* v. *Crossley*, 5 W. R. 35; *Parr* v. *Lovegrove*, 4 Drew. 170; and for forms of orders, see Seton on Decrees, p. 593, *et seq.*

(*q*) *Wood* v. *Machu*, 5 Ha. 158, 162.

(*r*) *Upperton* v. *Nicholson*, L. R. 6 Ch. Ap. 436.

(*s*) 1 Ke. 408.

(*t*) *Ibid.*

(*u*) *Winterbottom* v. *Ingham*, 9 Sim. 654: and as to suits commenced by Claim, see Schedule C. No. 10, to Orders of April, 1850.

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The reference of title is now to the Judge in Chambers. The purchaser brings in written objections to the title; which, if not assented to or removed, are argued either at Chambers or in open Court (x). Occasionally, although rarely, the title generally, or the particular points in question, are referred from Chambers to the Conveyancing Counsel of the Court for his opinion. The ultimate decision of the Court, either for or against the title, is embodied in the chief clerk's certificate, which being adopted and signed by the Judge becomes binding on the parties, unless within eight days an application be made to discharge or vary it. Such an application being made to the Judge who signed the order, is by him usually refused without argument; being merely a *pro formâ* proceeding in order to lay a foundation for an appeal (y).

Course of proceeding on reference.

Pending the reference, the defendant cannot dismiss the bill for want of prosecution (z).

Purchaser need not accept doubtful or merely equitable title;

A purchaser will not be compelled to take a doubtful title (a): or a merely equitable title (b), unless the sale be under a decree of the Court (c), although he may have consented to go into Chambers upon a reference as to the title directed in an administration suit (d): nor will he be compelled to take an equitable title which his vendor, who purchased from the Court, was himself obliged to accept (e); nor, without his consent, would a case have

(x) See *Pegg* v. *Wisden*, 16 Jur. 1105.

(y) See *York and N. M. R. Co.* v. *Hudson*, 18 Beav. 73; *Rhodes* v. *Ibbetson*, 4 De G. M. & G. 787; and see further as to taking objections to the certificates, *infrà*.

(z) *Collins* v. *Greaves*, 5 Ha. 596; *Gregory* v. *Spencer*, 11 Beav. 143.

(a) *Shapland* v. *Smith*, 1 Bro. C. C. 75; *Vancouver* v. *Bliss*, 11 Ves. 458, 465; *Sloper* v. *Fish*, 2 Ves. & B. 145; *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559, 569; *Earl of Lincoln* v. *Arcedeckne*, 1 Coll. 98; *Blosse* v. *Lord Clanmorris*, 3 Bli. 62; see the argument of defendant's counsel in *Howarth* v. *Smith*, 6 Sim. 161; Sug. 403; *Collier* v. *McBean*, L. R. 1 Ch. Ap. 81.

(b) *Howarth* v. *Smith*, *ubi suprà*, and *Abel* v. *Heathcote*, 2 Ves. J. 100; *Law* v. *Urlwin*, 1 Sim. 377.

(c) *Infrà*.

(d) *Cann* v. *Cann*, 1 Sim. & St. 284.

(e) *Lord Waltham's case*, Sug. 397.

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or consent to a case being sent to Law;

been sent for the opinion of a Court of Law (*f*); nor will an inquiry be directed as to a doubtful matter of fact (*g*); for in neither case would adverse claimants be bound by the result (*h*): and if, upon the return of a certificate from a Court of Law in favour of the title, the Court had any doubt upon the point, a case would have been directed to another Court of Law (*i*); and notwithstanding such certificate, the Court of Chancery would entertain any equitable objection to the title (*k*), and might refuse to enforce specific performance (*l*).

and the Court may now determine doubtful facts without a trial at law.

Under the Chancery Amendment Act, 1858 (*m*), the Court has power to direct that any question of fact arising in any suit or proceeding shall be tried before the Court itself; and under the Chancery Regulation (Sir John Rolt's) Act, 1862 (*n*), the Court *shall* determine every question of law or fact, cognizable in a Court of Law, on the determination of which the title to relief depends; but it has power to direct an issue to try any question of fact before a Court of Common Law in London or Middlesex, or at the Assizes, wherever this is the more convenient course (*o*). These provisions are not to apply where a Court of Common Law has concurrent jurisdiction, and the legal question has been improperly brought into Equity (*p*). It seems that the Court will not, under these enlarged powers, direct a question of fact to be tried before itself, except in cases where it would formerly have directed an issue, or given leave to bring an action at Law (*q*); and, except by con-

(*f*) *Roake* v. *Kidd*, 5 Ves, 647.

(*g*) See *Pyrke* v. *Waddingham*, 10 Ha. 11; but see comments on this case in *Mullings* v. *Trinder*, L. R. 10 Eq. 449.

(*h*) *Ibid.*

(*i*) See *Trent* v. *Hanning*, 10 Ves. 500; Sug. 386; it appears that in the first instance the plaintiff selects the Court; *Walton* v. *Holt*, 13 Jur. 355.

(*k*) *Sheffield* v. *Lord Mulgrave*, 2 Ves. jun. 526; compare 14 & 15 Vict. c. 83, s. 8, and *Falkner* v. *Grace*, 9 Ha. 280. The Court will only seek the assistance of the Common Law Judges in cases of real difficulty, *Howard* v. *Wheatley*, 3 De G. M. & G. 628; Dan. Ch. Prac. 884.

(*l*) *Morrison* v. *Barrow*, 1 De G. F. & Jo. 633.

(*m*) 21 & 22 Vict. c. 27, ss. 3, 4, 5.

(*n*) 25 & 26 Vict. c. 42, s. 1.

(*o*) Sect. 2; and see *Fernie* v. *Young*, L. R. 1 E. & Ir. Ap. 63, 71, 79.

(*p*) Sect. 4.

(*q*) See *George* v. *Whitmore*, 26 Beav. 557; *Morrison* v. *Barrow*, 1

sent, will not, until the hearing of the cause, direct the issue to be tried (r). Of course, no final decree can be pronounced, until the result of the issue is known. Chap. XVIII. Sect. 10.

Reference under the Judicature Act, 1873.

Under the Judicature Act, 1873 (s), subject to any restrictions or conditions imposed by rules of Court and to the power of transfer, any party to any cause or matter involving the trial of a question or issue of fact, or partly of fact and partly of law, may, with the leave of the Judge or Judges to whom or to whose decision the cause or matter is assigned, require the question or issue to be tried and determined by a Commissioner or Commissioners of Assize, or at sittings to be held in Middlesex or London; and by the rules of procedure under the Act (t), the Court or Judge may in any action, and apparently at any stage of it, order that different questions of fact arising therein shall be tried by different modes of trial, or that one or more questions of fact shall be tried before the others; and every trial of any question or issue of fact by a jury is to be held before a single Judge, unless otherwise specially ordered.

Doubt must be a reasonable doubt.

The doubt, whether upon law or fact, must, in order to be a ground for rejecting the title, be a "grave and reasonable doubt" (u): and, as respects a question of law, must be founded on the present state of the authorities (x). According to Lord Hardwicke, "the Court, in carrying agreements into execution, must govern itself by a moral certainty; for it is impossible in the nature of things that there should be a mathematical certainty of a good title: there are often suggestions of old entails, and often doubts of what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate" (y): and the above

De G. F. & Jo. 638, 639; *Bradley* v. *Bevington*, 4 Drew. 511; *Earl of Egmont* v. *Darell*, 1 H. & M. 563; *Eaden* v. *Eaden*, ib. 573.

(r) See *George* v. *Whitmore*; *Morrison* v. *Barrow*; and *Bradley* v. *Bevington*, ubi suprà.

(s) 36 & 37 Vict. c. 66, sect. 29.

(t) See rules 32 & 33.

(u) See 1 Coll. 102.

(x) See *Eno* v. *Eno*, 6 Ha. 177.

(y) *Lyddal* v. *Weston*, Atk. 20.

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remarks are cited with approbation by Sir W. Grant (z). However, in a case before Mr. Baron Alderson, upon the above *dicta* as to moral and mathematical certainties being cited, the Court observed, "that only means that you cannot prove a title by means of reasoning, but only with the help of evidence; those sort of apothegms get a great deal more reputation than they deserve" (a).

Questions of Law more readily decided against purchaser than questions of construction.

As to doubts depending on a point of law, Lord St. Leonards suggests, that a judge "may feel himself more at liberty to decide a general point of law between vendor and purchaser than a question of construction of an informal instrument. which can afford no precedent, and upon which men may generally differ (b): and even an abstract point of law will not, if considered doubtful, be decided against a purchaser even by the House of Lords (c): and where the purchaser objected to the title upon the authority of a decision of a Court of Law in a similar case, the Court of Chancery, although entertaining a strong opinion against the correctness of such decision, would not have overruled it, without first directing a case (d). So, the test as to whether a title is doubtful or not, as between vendor and purchaser, has been held to be the certain conviction of the Court in deciding the point that no other Judge would take a different view (e). In one case, Lord Romilly, M.R., stated it to be his opinion, that where the title depends upon a question of Law, it is the duty of the Court to decide it; and that it is a reproach to the Law for the Court to declare itself unable to decide it (f).

(z) *Hillary* v. *Waller*, 12 Ves. 252; Sug. 392.

(a) *Hutchinson* v. *Morritt*, 3 Y. & C. 554.

(b) Sug. 386; see 10 Ha. 1; but see also *Minet* v. *Leman*, 1 Jur. N. S. 411; 20 Beav. 269; 7 De G. M. & G. 340.

(c) *Blosse* v. *Lord Clanmorris*, 3 Bli. 62, 71. Even a decision of the Lords will not render a title absolutely secure; see 11 Ves. 465; 1 Jac. & W. 569.

(d) *Peppercorn* v. *Peacock*, 4 Jur. 1122; *vide suprà*, n. (k); and see *Burke* v. *Annis*, 11 Hare, 232, 237.

(e) *Rogers* v. *Waterhouse*, 4 Drew. 329; but see now *Beioley* v. *Carter*, *infrà*.

(f) *Minet* v. *Leman*, *ubi suprà*; but see 10 Ha. 11; see also the remarks of Lord Romilly, M. R., in *Mullings* v. *Trinder*, L. R. 10 Eq. 449.

Decision of Court below, if reversed on appeal does not render title doubtful;

If there be an appeal, the fact of the title having been held bad in the Courts below will not be a reason for the Judge of the appellate Court considering the title too doubtful to force on a purchaser, if he himself entertain a clear opinion in its favour (*g*); and Lord Eldon, where a purchaser persisted in an objection, which, although doubtful on the previous authorities, had been decided in favour of the same vendor by a recent judgment of his Lordship, from which there had been no appeal, decreed specific performance *with costs* (*h*). In modern practice, a different rule has, until recently, prevailed; and the mere fact of the title having been held bad or doubtful in the Court below, has been held sufficient by the appellate Court to prevent its being forced upon the purchaser (*i*); thus, in effect, "leaving the ultimate decision of the question to the Court below, while the law provides an appeal to the Court above" (*k*). However, in a recent case, it was expressly laid down by the Lords Justices that a purchaser will be compelled to accept a title which appears good to the Court of Appeal, notwithstanding an adverse decision of the Court below (*l*); and this is now the well-settled rule.

nor adverse opinion of conveyancing counsel

The fact that one of the conveyancing counsel of the Court has expressed an opinion adverse to the title, is *à fortiori* not sufficient to make it doubtful in the judgment of the Court (*m*).

As to doubts respecting facts.

As to doubts respecting facts, we may here refer to the observations already made (*n*) as to presumptions of facts as between vendor and purchaser.

(*g*) See Sug. 389; and *Beioley* v. *Carter*, L. R. 4 Ch. Ap. 230.

(*h*) *Biscoe* v. *Wilks*, 3 Mer. 456.

(*i*) See as a late example of this practice, *Collier* v. *M'Bean*, L. R. 1 Ch. Ap. 81.

(*k*) *Per* Lord St. Leonards in *Sheppard* v. *Doolan*, 3 D. & War. 8.

(*l*) *Beioley* v. *Carter*, L. R. 4 Ch. Ap. 230; see too *Ball* v. *Hutchens*, 32 Beav. 615; *Alexander* v. *Mills*, L. R. 6 Ch. Ap. 124; *Radford* v. *Willis*, L. R. 7 Ch. Ap. 7; *Bell* v. *Holtby*, L. R. 15 Eq. 178.

(*m*) *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323.

(*n*) *Suprà*, 322 *et seq.*, 333 *et seq.*; and see note at the foot of this chapter for a classification of titles held good, bad, or doubtful.

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Title not considered doubtful on mere suspicion of fraud.

In a case where it appeared that, upon a previous purchase, a tenant for life had, after the contract, exercised a power of appointment in favour of one of his sons, and that the father, mother, and son, had thereupon conveyed to the purchaser, the money, being expressed to be paid to the three conveying parties, Lord Eldon held that the mere possibility of the appointment having been founded on a corrupt agreement between the father and son was not a valid objection to the title (*o*). So, where there was a clear intention to exercise the power, but the instrument exercising it contained only an indirect reference to the instrument creating the power, and there had been previous fraudulent executions, the title was forced on the purchaser (*p*). But where the appointment was made *pendente lite*, after objection taken to the title, the purchaser was discharged (*q*): and where the vendor claimed by purchase from his son, the consideration being an annuity and the release of a debt, the purchaser was held entitled to evidence not only of the debt being due, but, of the fairness of the transaction (*r*).

Pendency of adverse suit, no ground for certifying against title.

Even the mere fact that a suit is pending, in which part of the lands is claimed adversely to the vendor, is not, in itself, an absolute objection to the title; and in such a case, upon a reference under the old practice, the Master should have stated the point in question in the adverse suit, and his opinion thereon (*s*). The Court, however, it is conceived, would not, unless the point were perfectly clear, or, perhaps, in any case, compel, the purchaser to complete, until the adverse claim had been decided on (*t*). In a case before Lord Langdale, where the intended purchaser had received notice of a claim to the estate, founded on the alleged invalidity of an appointment, which claim, however, had not been followed

(*o*) *M'Queen* v. *Farquhar*, 11 Ves. 467. See as to such appointments, *Campbell* v. *Home*, 1 Y. & C. C. C. 664; *Salmon* v. *Gibbes*, 18 Jur. 355, and cases cited.

(*p*) *Carver* v. *Richards*, 27 Beav. 488; 3 De G. F. & Jo. 548.

(*q*) *Weir* v. *Chamley*, 1 Ir. Ch. R. 295.

(*r*) *Boswell* v. *Mendham*, 6 Madd. 373.

(*s*) *Osbaldeston* v. *Askew*, 1 Russ. 160, see *Dent* v. *Thornton*, 9 Ha. 229.

(*t*) See *Bentley* v. *Craven*, 17 Beav. 204.

up by any act, and no fact had been stated as a foundation for it, his Lordship decided that the purchaser was bound to complete; but added, "if it were possible to institute any inquiry as to the facts which took place, I think it ought to be done, for the satisfaction of the purchaser; but I do not see how that can be" (u). In a later case, where the vendor claimed under a suspicious will, and the heir had failed in an action of ejectment and in a subsequent motion for a new trial, Lord Cottenham, reversing the Vice-Chancellor's decision, held that, as means existed of bringing the objection to a test, the Court would do so, before compelling the purchaser to take the title: and required the vendor to file a bill to establish the will against the heir (x). Where, however, the will was disputed, not by the heir, but by parties claiming under an adverse will, and the vendor had bought up the rights, if any, of the heir, it was held that the purchaser was not entitled to have the will established against the heir, and that proof of heirship need not be gone into (y).

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Adverse right not likely to be enforced, held not to render title bad.

An anonymous case is cited by Lord St. Leonards (z), in which a man having agreed to buy an estate with mines, and objecting that the mines were under a common, over which others had a right of common, Lord Eldon, observing on the improbability of disturbance, and that nominal damages only would probably be given in the event of an action, decreed specific performance; but the case seems to be of very questionable authority. Lord St. Leonards considers (a) that the decision must have turned on the improbability of disturbance: but it may reasonably be doubted, whether the supposed absence of any adequate motive for parties to assert their rights by litigation constitutes that sort of improbability upon which a purchaser

(u) *Green* v. *Pulsford*, 2 Beav., see p. 75.

(x) *Grove* v. *Bastard*, 2 Ph. 619; but on this being done, and the will established, Lord Truro fixed the purchaser with the costs of the suit for specific performance; *S.C.*, 1 De G. M. & G. 19.

(y) *M'Culloch* v. *Gregory*, 2 Jur. N. S. 1134; 3 K. & Jo. 12.

(z) V. & P. 393.

(a) *Ibid.*

is bound to rely. However, in an earlier case, the existence in the Crown of a right to the mines under the estate, but without an express reservation of a right of entry, was held by Lord Hardwicke to be no objection to the title; it appearing that no search had been made for mines for upwards of a century, and that probably no mines existed, and that the Crown's right never had been, and probably never would be, exercised (*b*); so a right of re-entry by the Crown, which the Court considers incapable of being enforced, is no objection to the title (*c*).

Existence of mining rights, whether a valid objection to title.

It has been held, that the mere reservation of mining rights is no objection to the title, if the Court is satisfied that there is no subject-matter for the reservation to act upon, or that the legal right to exercise it has ceased (*d*); but the mere reservation seems to infer the existence of the subject-matter (*e*); and in a modern case, the existence of mining rights was held to be a valid objection to the title, although the mine had been abandoned for fifteen years, and there was no proof of any intention to resume the working (*f*). In one case, a purchaser, who had stipulated that the vendor should apply to the Lord of the Manor and use his best endeavours to enfranchise the property, which was then of copyhold tenure, and deduce a good title thereto as freehold was held not entitled to object to an enfranchisement effected under the Copyhold Act, 1852, with a reservation of the mines to the lord (*g*).

(*b*) *Lyddal* v. *Weston*, 2 Atk. 19. The case seems to have been decided under the idea that the Crown, no right of entry being reserved, could neither work nor authorize others to work the mines, unless they were first opened by the owner of the soil; but it seems doubtful whether this is good law; see *Case of Mines*, Plow. 313; *Seaman* v. *Vawdrey*, 16 Ves. 393; Bainbridge on Mines, 41.

(*c*) *Flower* v. *Hartopp*, 6 Beav. 476.

(*d*) *Martin* v. *Cotter*, 3 J. & L., see 509; *Stewart* v. *Marq. of Conyngham*, 1 Ir. Ch. R. 534.

(*e*) See 3 J. & L. 510.

(*f*) *Ramsden* v. *Hirst*, 4 Jur. N. S. 200; the purchaser, electing to complete, was held entitled to compensation, notwithstanding the difficulty of estimating it.

(*g*) *Kerr* v. *Pawson*, 25 Beav. 394. See as to the reservation of minerals on sale of the surface, 25 & 26 Vict. c. 108, and *vide infrà*, Ch. XX.

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Remarks on doubtful title in *Pyrke* v. *Waddingham.*

In *Pyrke* v. *Waddingham* (*h*), where the vendor's title depended upon the construction of limitations in a will, Sir Geo. Turner V.-C., although expressing his opinion in favour of the title, refused to enforce specific performance. After recognizing the right of every purchaser to require a marketable title, that is to say, a title which, so far as its antecedents are concerned, may at all times and under all circumstances be forced on an unwilling purchaser, the learned judge observed, "that in these cases it is the duty of the Court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be: that this is the true rule to be applied in such cases is the more apparent from the repeated decisions that the Court will not compel a purchaser to take a title which will expose him to litigation or hazard. If doubts arise upon a question connected with the general law, the Court is to judge whether the general law upon the point is or is not settled; enforcing specific performance in the one case, and refusing to enforce it in the other. If the doubts arise upon the construction of particular instruments, and the Court is itself doubtful upon the points, specific performance must of course be refused: and even though the Court may lean in favour of the title, its duty is, either to consider whether it would trust its own money upon it, or at least to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be effected by extrinsic circumstances, which neither the purchaser nor the Court has the means of satisfactorily investigating, specific performance is to be refused. In the cases of *Rushton* v. *Craven* (*i*), *Chorlton* v. *Craven* (*k*), and *Clonmert* v. *Whitaker* (*l*), where the Court enforced specific performance, its own opinion had been fortified by the opinion

(*h*) *Pyrke* v. *Waddingham*, 10 Ha. 1; and see *Freer* v. *Hesse*, 4 De G. M. & G. 495: see also *Minet* v. *Leman*, 20 Beav. 269; 7 De G. M. & G. 340; *Rogers* v. *Waterhouse*, 4 Drew. 329; but see now *Beioley* v. *Carter*, L. R. 4 Ch. Ap. 230; *suprà*, p. 1103.

(*i*) 12 Price, 599; see Sug. 392.

(*k*) 12 Price, 619.

(*l*) 2 Jarm. Wills.

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of a Court of Law: and it could not be universally held that, because the Court is of opinion in favour of the title, a purchaser is to be compelled to accept it: each case must depend upon the nature of the objection, and the weight which the Court may be disposed to attach to it: and, in determining whether specific performance is to be enforced or not, it must not be lost sight of, that the exercise by the Court of its jurisdiction in cases of specific performance is discretionary; and that it has no means of binding the question as against adverse claimants, or of indemnifying the purchaser if its own opinion should ultimately turn out not to be well founded." And after stating that his own opinion was much in favour of the title, the learned judge went on to remark, that he was unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy him that other competent persons might not entertain a different opinion; or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard. Upon these grounds, therefore, he was of opinion that specific performance ought not to be decreed; and he refused to direct a case for the opinion of a Court of Law: observing the rule of the Court to be, that it will not against the purchaser send a case upon a doubtful question of law any more than it will direct an inquiry upon a doubtful question of fact; and for the same reason, *viz.*, that adverse claimants would not be bound by the result.

The title which formed the subject of the suit in *Pyrke* v. *Waddingham*, recently came before Lord Romilly, M. R., in a suit for specific performance against a purchaser who relied on precisely the same objections as were urged in the former suit; but his lordship, whose own opinion coincided with that of the Vice-Chancellor as to the invalidity of the objection, made a decree for specific performance; laying it down as a general rule that a "judge ought to enforce the title whenever he really and sincerely believes that a man

of sense will not differ from him in the construction he has come to in the particular case (*m*)."

Outstanding interest when a ground for reporting against title.

Where a necessary party to the title is, neither in Law nor in Equity, subject to the control of the vendor, but has an independent interest, and no evidence is furnished of a legal or equitable obligation on the part of such stranger to concur in the sale, the certificate should be against the title (*n*), on the ground of such non-concurrence: not that a good title can be made upon the stranger concurring (*o*). But where such necessary party is bound, as in the case of a trustee (*p*) or mortgagee, or agrees (*q*) to concur, the certificate may be in favour of the title (*r*). The certificate, however, should, in the case of an incumbrance, it is conceived, be, that a good title can be shown subject to the incumbrance, and that the incumbrancer is bound to concur: not that a good title can be made upon payment of the incumbrance (*s*).

Certificate when absolute opened only on very special grounds.

We may here remark that it is only on very special grounds that a certificate will be opened after it has become absolute by the lapse of the eight days from the date of its being filed (*t*); but a summons, if applied for and obtained within the eight days, is sufficient to arrest the certificate (*u*). The time within which the application must be made runs during the vacations (*x*).

Where the certificate is in favour of the title.

If the certificate be in favour of the title, and no application be made to discharge or vary it, a decree for specific

(*m*) *Mullings* v. *Trinder*, L. R. 10 Eq. 449, 456. The title had originally been accepted by a very eminent Equity Judge, while in practice, and advising on behalf of mortgagees.

(*n*) *Esdaile* v. *Stephenson*, 6 Mad. 366; *Douglass* v. *London and North-Western R. Co.*, 3 K. & Jo. 173; see p. 181.

(*o*) *S. C.*, as reported in Sug. 350.

(*p*) *Avarne* v. *Brown*, 14 Sim. 303; *Jumpson* v. *Pitcher*, 1 Coll. 13.

(*q*) See *Paton* v. *Rogers*, 6 Mad. 256; *Sidebotham* v. *Barrington*, 4 Beav. 110.

(*r*) 6 Mad. 367; Dan. Ch. Prac. 1132.

(*s*) See Sug. 350; *Magennis* v. *Fallon*, 2 Mol. 575.

(*t*) *Howell* v. *Kightley*, 8 De G. M. & G. 325; *Lamb* v. *Orton*, 6 Jur. N. S. 61; *Ashton* v. *Wood*, 3 Jur. N. S. 146, a case of mistake.

(*u*) *Wycherley* v. *Barnard*, Johns. 410.

(*x*) *Ware* v. *Watson*, 7 De G. M. & G. 739.

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performance will be made on the hearing on further consideration, unless in the interim, any matter appear which affects the title, in which case, although the time for applying to discharge or vary the certificate may have expired, a further reference may be ordered, under special circumstances, on motion (*y*).

When objections should be taken.

Any objections to the chief clerk's finding should, if possible, be taken before the certificate is signed by the Judge; who will in that case hear the matter either in Chambers or in Court, by adjournment; thus avoiding the delay and expense of a second reference (*z*).

If objections allowed, a fresh reference will be directed at vendor's request.

If an application be made to discharge or vary the certificate in favour of the title, and if, on hearing the motion, the Court considers the certificate erroneous, on the ground of a mistake having been made as to the title which the purchaser can require (*a*), or as to the sufficiency of the evidence in support of the title (*b*), or as to the construction of an instrument (*c*), the title will, at the vendor's request, be again referred, in order that he may have an opportunity of removing the defect. It was held by Sir J. Wigram, V.-C., that the reference back is not a matter of course, but depends on the vendor satisfying the Court that he has a fresh case to bring forward (*d*); but in a later case before Lord Cottenham, his Lordship laid down, as a general rule, that no special case need be made by the vendor; but that where the report is in favour of the title, and the Court holds a different opinion, and he desires an opportunity of making out a better title, the Court will deal with the matter in the view that a conclusion in favour of the title

(*y*) *Jendwine* v. *Alcock*, 1 Mad. 597.

(*z*) *Parr* v. *Lovegrove*, 4 Drew. 170, 176; and see XXXV. of the Cons. Orders.

(*a*) *Fildes* v. *Hooker*, 2 Mer., see p. 429.

(*b*) *Andrew* v. *Andrew*, 3 Sim. 390; 8 De G. M. & G. 336; *Fildes* v. *Hooker*, 3 Mad. 193; *Curling* v. *Flight*, 2 Ph. 613; Dan. Ch. Prac. 1131.

(*c*) *Egerton* v. *Jones*, 3 Sim. 392, 409; 1 Russ. & M. 694; and see *Portman* v. *Mill*, *ibid.* 696.

(*d*) *Dawes* v. *Betts*, 12 Jur. 412; the exceptions were overruled on appeal, 12 Jur. 709.

has been prematurely come to, and will therefore send it back for further investigation: that there is no reason why the same practice should not prevail whether the original reference be made on motion or by decree; but that in both cases, if the vendor wishes for an opportunity of making a better title, the Court should give him the option of doing so, and only conclude the matter when he says he can go no further (*e*). Upon the fresh reference the purchaser seems not to be restricted to his original objections (*f*). Objections to a title should not be general, but specific (*g*).

Dismissal of bill.

If the objections to the title are allowed, and no further reference be asked by the vendor, his bill will be dismissed; but the purchaser, if plaintiff, may in general elect to take the defective title (*h*). Whether the objections to the title are finally allowed in chambers, or are allowed in open Court, either upon an adjourned summons, or upon a motion to discharge or vary a certificate in favour of or against the title, the bill cannot be dismissed, without the cause being heard on further consideration; but it may be set down to be heard on further consideration, along with the hearing of the adjourned summons, or of the motion to discharge or vary the certificate.

Fresh objections.

If all the objections are overruled, the purchaser cannot make other objections to the title (*i*); except, it is conceived, in the case of fresh matter, which affects the title, being subsequently discovered (*k*).

Certificate against title.

If the certificate be against the title, and there be no application to discharge or vary it, or if such application be made, and prove unsuccessful, the vendor's bill may be dismissed with costs on the hearing on further consideration.

(*e*) *Curling* v. *Flight*, 2 Ph. 616; and see *S. C.*, 12 Jur. 423; and see *Dawes* v. *Betts*, on appeal, 12 Jur. 709.

(*f*) *Fildes* v. *Hooker*, 3 Madd. 193; Sug. 350.

(*g*) *Flower* v. *Hartopp*, 6 Beav. 476.

(*h*) *Infrà*, p. 1115.

(*i*) *Brooke* v. *Anon.*, 4 Madd. 212.

(*k*) See *Jeudwine* v. *Alcock*, 1 Madd. 597; Dan. Ch. Prac. 1132.

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Reference back, when directed.

If the application to discharge or vary the certificate against the title be unsuccessful, the Court will sometimes send the case back to chambers (*l*); but not, it is conceived, upon mere speculation, nor unless the vendor can satisfy the Court of the probability of the title being perfected (*m*) within a reasonable time (*n*). Long previous delay, of course, would be a reason for less additional time being allowed (*o*); and the Court will not allow a seller to lie by, during the reference, and then, upon further consideration, attempt to make a title (*p*); nor will it show any favour to a vendor who, or whose solicitor, has improperly concealed a defect in the title (*q*); nor allow further time, when, owing to the long interval which has elapsed since the contract, and the altered situation of the parties, substantial justice would not be done by decreeing specific performance (*r*); the rule being, that although a vendor may, up to the time of making the certificate, do everything he can to perfect his title, the allowance of further time beyond that period is matter of indulgence (*s*).

Certificate against title absolute; yet decree will be made on hearing, if vendor can then remove objections to title.

So if, no application being made to discharge or vary the certificate, the cause comes on for further consideration, or for original hearing if the reference were made before hearing, and the vendor can satisfy the Court that he can remove the defect in the title,—as where he can procure the concurrence of a party having an interest,—specific performance will be decreed without a reference back to chambers (*t*).

(*l*) See *Sidebotham* v. *Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; and see *Fraser* v. *Wood*, 8 Beav. 342; *Smith* v. *Capron*, 13 Jur. 148, and *Chamberlain* v. *Lee*, 10 Sim. 444.

(*m*) See judgment of V.-C. Wigram in *Dawes* v. *Betts*, 13 Jur. p. 416.

(*n*) *Fraser* v. *Wood*, 8 Beav. 339; and see *Whittaker* v. *Whittaker*, cited 10 Ves. 599, and *Lechmere* v. *Brasier*, 2 Jac. & W. 289; *Magennis* v. *Fallon*, 2 Mol. 566; *Lachlan* v. *Reynolds*, Kay, 52.

(*o*) See *Fraser* v. *Wood*, *suprà*.

(*p*) *Esdaile* v. *Stephenson*, Sug. 350.

(*q*) See *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369, 377.

(*r*) *Paton* v. *Rogers*, 6 Madd. 256; *Dawes* v. *Betts*, 12 Jur. 416; *Noel* v. *Newman*, *suprà*, p. 1059.

(*s*) See *Garnett* v. *Acton*, 28 Beav. 333, 337.

(*t*) *Coffin* v. *Cooper*, 14 Ves. 205; and see *Moulton* v. *Edmonds*, 6 Jur. N. S. 305.

So if, the certificate being against the title, and there being no application to discharge or vary it, the purchaser moves that he may be discharged from the contract, the vendor may show that the title has been perfected subsequently to the certificate; *e. g.*, by a private Act of Parliament (*u*).

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Removal of objections, an answer to purchaser's motion to be discharged.

We have seen that, as a general rule, the purchaser may insist upon a reference as to title; and the Court will not tie him down to the objections raised upon the pleadings: he may, however, waive such *primâ facie* right wholly or in part: and if he clearly rest his objection merely upon what Lord Eldon describes as "one neat dry point," or, it is conceived, upon a plurality of neat dry points, the Court, being satisfied that no other question of title remains open, will make a decree without a prior reference (*x*): but he will not be compelled to take a defective title merely because, being plaintiff, he filed his bill with notice of the defect (*y*). A general admission by the purchaser in his answer that, according to his belief, the plaintiff was entitled to the property, the subject of the suit, has been held to be an admission of the fact which he could not afterwards question (*z*).

Purchaser's general right to reference of title—how it may be waived.

Where a purchaser was let into possession, and soon afterwards received the abstract and retained it for four years without objecting to the title, he was held to have waived his right to a reference (*a*); but, in a later case, it was held that, even after great delay and acquiescence (there being no express waiver), the Court will not compel the purchaser to complete if the title is manifestly bad (*b*): and, though he may have waived all objections appearing on the abstract, he may not be precluded from objecting to the title *aliunde* (*c*).

By acquiescence.

Purchaser after great delay not forced to take clearly bad title.

(*u*) See *Jenkins* v. *Hiles*, 6 Ves. 653, 654, and V.-C. Wigram's remarks in *Lucas* v. *James*, 7 Ha. 425; and *Harris* v. *Mott*, 14 Beav. 170.

(*x*) *Dalby* v. *Pullen*, 1 Russ. & M. 296.

(*y*) *Stapylton* v. *Scott*, 16 Ves. 272; and see at Law, *Barnett* v. *Wheeler*, 7 Mee. & W. 364.

(*z*) *Phipps* v. *Child*, 3 Drew. 709.

(*a*) *Fleetwood* v. *Green*, 15 Ves. 594; and see *Margravine of Anspach* v. *Noel*, 1 Mad. 310; *Wallis* v. *Woodyear*, 2 Jur. N. S. 179; Sug. 353.

(*b*) *Blachford* v. *Kirkpatrick*, 6 Beav. 232; and see *Warren* v. *Richardson*, You. 1; *Hume* v. *Bentley*, 5 De G. & S. 527; *Darlington* v. *Hamilton*, Kay, 556.

(*c*) *Born* v. *Stenson*, 24 Beav. 631.

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Decree for specific performance—its form.

According to the old practice, there were two ways of framing a decree in a suit for specific performance. The one was to declare that the plaintiff was entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title. The other, to refer the title, and to follow up that direction by a declaration that if a good title was shown the agreement ought to be specifically performed (*d*). The mere direction of the reference seems, however, to be an implied declaration of the right to specific performance (*e*): so that, on the hearing on further consideration, the Court will not enter upon any other defence set up by the answer (*f*). The present practice, however, in suits where, by reason of the contract itself having been disputed, the cause is heard before the reference, seems to be, to declare absolutely that the plaintiff is entitled to a specific performance of the agreement, and to direct a reference to inquire whether a good title can be made;—not to declare that the plaintiff is entitled, &c., *if* a good title can be made (*g*):—and, in such a case, the Court, in directing a reference, will not direct an inquiry as to when the title was first shown (*h*); and although the inquiry is directed in general terms, regard will be had, in prosecuting it, to the terms of the contract (*i*). Under the common decree for specific performance and for inquiry as to title, the purchaser may, it seems, raise objections, which he had abandoned before the suit was instituted (*j*); and if the vendor wishes to prevent the abandoned objections being raised again in the course of the inquiry, this point should be disposed of at the hearing and noticed in the decree (*k*).

(*d*) *Per* Lord Eldon in *Stevens* v. *Guppy*, 3 Russ. p. 182.

(*e*) See *Mole* v. *Smith*, Jac. 495.

(*f*) *Le Grand* v. *Whitehead*, 1 Russ. 309.

(*g*) *Clive* v. *Beaumont*, 1 De G. & S., see p. 408; *Gibbins* v. *North Eastern Metropolitan Asylum*, 11 Beav., see p. 5.

(*h*) *S. C.*

(*i*) *Upperton* v. *Nickolson*, L. R. 6 Ch. Ap. 436.

(*j*) *Curling* v. *Austin*, 2 Drew. & Sm. 129; see this case; and comments of Sir W. M. James, L. J., upon it in *Upperton* v. *Nickolson*, *ubi suprà*, where a valid objection, taken for the first time pending a reference as to title, was held to be too late. For forms of decree, see Seton, 593, *et seq.*

(*k*) *Upperton* v. *Nickolson*, *ubi suprà*.

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Plaintiff may take a decree adopting parol variation proved by defendant's agent.

Where the agreement was in writing, and a parol variation, not set up by the answer, came out on the cross-examination of the defendant's agent, who was one of the plaintiff's witnesses, the Court seemed to consider that this was a proper subject for inquiry before finally disposing of the case; but on the plaintiff consenting to adopt the parol variation as part of the contract, specific performance was at once decreed with costs (*l*).

May elect to take defective title.

The purchaser, it appears, may elect to take a defective title (*m*): "the covenants being so framed as not to leave the seller exposed to an action on account of the flaw: but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller," the purchaser seems to have no such right (*n*).

Decree for specific performance, no bar to claims by persons not parties.

We may here remark, that a decree, even by the Lords (*o*), for specific performance, in a suit between vendor and purchaser, is no protection against the adverse claims of persons not parties to the suit (*p*): except so far as that, if any particular question of title be decided in favour of the vendor, such decision forms a precedent which probably would, and in any inferior Court ought to, be followed on a future occasion: also, that such a decree may be abandoned or waived by delay, or by the conduct of the parties entitled to the benefit of it (*q*).

In a case in Ireland, where, pursuant to an order of the House of Lords, a decree was made by the Court of Chancery directing a conveyance, and before it was executed the party bound to convey purchased, and procured a conveyance to himself of, other interests which the decree was not intended to affect, it was held that he could not set up any right in

(*l*) *London and Birmingham R. Co.* v. *Winter*, Cr. & Ph. 57.

(*m*) *Bennett* v. *Fowler*, 2 Beav. 302.

(*n*) Sug. 355.

(*o*) *Suprà*, p. 1102, n. (*r*).

(*p*) See *Wood* v. *White*, 4 Myl. & C. p. 470.

(*q*) See *Lord Rosse* v. *Sterling*, 4 Dow. 442.

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respect of them, until he had first obeyed the decree; and this decision was affirmed by the House of Lords (r).

Plaintiff not allowed to take decree according to that construction of agreement which he had repudiated.

Where the plaintiff in his bill offered to perform an ambiguous agreement, "according to the true intent and meaning thereof," but uniformly up to the hearing insisted on his own construction, as the only contract between himself and the defendants, not offering to take up the other construction which the defendants were at one time willing to perform, Sir T. Plumer held the case to be perfectly different from one where the plaintiff calls upon the Court to declare the true construction, submitting to perform according to the same: and, his opinion being against the plaintiff's construction, he refused to enforce specific performance against the defendants according to the construction contended for by their answer (s).

Plaintiff offering to perform contract with parol variations for defendant's benefit entitled to decree.

And where the plaintiff by his bill, praying the performance of a written agreement, offers to the defendant the benefit of certain subsequent parol variations, the Court will decree specific performance with the variations, if the defendant elect to take advantage of them; or otherwise of the original agreement (t).

Parol variation proved by defendant—no decree for plaintiff: but defendant may take decree without cross bill.

So, where the plaintiff by his bill offers to perform the agreement (u), and the defendant proves a parol variation, the Court will, at his request, without a cross bill, decree specific performance with the variation, and even fix the plaintiff with the costs (x).

Decree should direct accounts, &c.

The decree should also (unless the particular circumstances of the case render such a direction unnecessary,) direct the usual accounts to be taken of the rents and profits of the estate, and of interest on the purchase-money; and should

(r) *Persse* v. *Persse*, 2 Jur. N. S. 551; 7 Cl. & Fin. 318.

(s) *Clowes* v. *Higginson*, 1 Ves. & B., see p. 535.

(t) *Robinson* v. *Page*, 3 Russ. 114.

(u) 1 C. P. C., N. R. 353.

(x) *Fife* v. *Clayton*, 13 Ves. 546; *S. C.*, 1 C. P. C., N. R. 351; *Gwynn* v. *Lethbridge*, 14 Ves. 585; see *Higginson* v. *Clowes*, 15 Ves. 525.

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order payment of the balance due from the purchaser, and the execution of the conveyance, and delivery of the deeds, by the vendor (*y*): and an account may be decreed on the footing of the agreement; although, as in the case of a lease, the subject-matter of the contract has expired by lapse of time before the hearing (*z*). When the purchaser, having paid his purchase-money into Court, is ascertained to be entitled to an abatement in respect of deteriorations, &c., the ascertained amount of abatement will be repaid to him with interest (*a*).

Abstraction of part of property by vendor.

Where part of the subject-matter of the contract is abstracted by the vendor, *pendente lite*, Equity will give relief, even upon supplemental bill after a decree for specific performance; and in order to assess the amount of damages, has allowed the plaintiff to bring an action to ascertain *quantum damnificatus*, and required the defendant to admit the necessary facts (*b*); but now, under Lord Cairns' Act (*c*), wherever the Court has jurisdiction to entertain a suit for specific performance, it may award damages, without sending the plaintiff to Law.

Decree in vendor's suit may direct a re-sale, and payment of the deficiency by purchaser.

If, on a bill filed by the vendor, the purchaser be considered unable to pay what is due in respect of purchase-money, interest, and costs, the decree may direct that, in default of payment, the premises be sold for the purpose of satisfying the amount so due; and that the deficiency, if any, be paid by the purchaser (*d*): and the vendor can prove as a specialty creditor (*e*) in respect of such deficiency (*f*) in a suit instituted for the administration of the assets of the purchaser; the amount to be found due upon the reference

(*y*) See Seton on Decrees, 616.

(*z*) *Wilkinson* v. *Torkington*, 2 Y. & C. 726.

(*a*) *Ferguson* v. *Tadman*, 1 Sim. 530.

(*b*) *Nelson* v. *Bridges*, 2 Beav. 239, 244.

(*c*) 21 & 22 Vict. c. 27; and *vide suprà*, p. 982, *et seq.*

(*d*) See *Haydon* v. *Bell*, 1 Beav. 337, 343; *Rome* v. *Young*, 3 Y. & C. 199; *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321.

(*e*) *S. C.*

(*f*) *Rome* v. *Young*, 1 Y. & C. 204.

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constituting a judgment debt within the 1 & 2 Vict. c. 110, s. 13 (*g*); and being proveable in bankruptcy (*h*).

Direction that all necessary parties shall concur.

A direction is sometimes inserted in the decree that "all other necessary parties (if any)" shall join in the conveyance; but the omission of these words is wholly immaterial; as a direction that the vendor shall convey includes, in effect, the concurrence of his mortgagees and all other necessary conveying parties (*i*).

As to conveyance being settled by the Court.

The usual direction as to the conveyance is that it shall be settled by the Court "if the parties differ about the same" (*j*): these latter words will, however, it seems, be omitted, if an infant is a necessary party to the conveyance (*k*); or if it will, by Statute, operate to convey the infant's estate, although he may not actually be a party (*l*); but not merely on the ground of his being interested in the estate, as in the case of an infant *cestui que trust* whose trustees have power to sell and give receipts (*m*). In one case the decree went on to direct that the conveyance should contain a particular clause in favour of the plaintiff (*n*): but it does not appear that the Court will, in general, deliver any positive direction or declaration as to the rights of the parties (*o*). If the decree omit the usual direction as to the conveyance, the omission may be supplied on petition (*p*).

Course of proceeding in Master's office, under old practice.

Under the old practice, if the matter came before the Master, the practice, as settled by the 76th Order of April, 1828 (*q*), was, for the party entitled to prepare the conveyance to bring the draft thereof into the Master's office,

(*g*) *Duke of Beaufort* v. *Phillips*, 1 De G. & S. 321; *Popple* v. *Henson*, 5 De G. & S. 318.

(*h*) *Ex parte Hunter*, 6 Ves. 94; *Bowles* v. *Rogers*, cited *ib.* 95.

(*i*) *Minton* v. *Kirwood*, L. R. 3 Ch. Ap. 614, 617.

(*j*) Seton on Decrees, 608.

(*k*) *Calvert* v. *Godfrey*, 2 Beav. 267; but see Seton, 1197.

(*l*) *Cheese* v. *Cheese*, 15 L. J. N. S. Ch. 28.

(*m*) *Richardson* v. *Ward*, 11 Beav. 378.

(*n*) *Blakesley* v. *Whieldon*, 1 Ha. 183.

(*o*) *Williams* v. *Teale*, 6 Ha. 254.

(*p*) *Trevelyan* v. *Charter*, 9 Beav. 140.

(*q*) See Edwards' Orders, 27, and Dan. Ch. Prac. by H. 1191.

and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party might inspect the same without fee, and might take a copy thereof if he thought fit: and at or before the expiration of the eight days, or such further time as the Master in his discretion allowed, such other party was obliged, either to agree to adopt the conveyance, or to signify his dissent therefrom; and in the latter case he had to deliver a statement in writing of the alterations which he proposed in the draft of the conveyance. But if he delivered no such statement in writing, or if the party bringing in the draft refused to adopt the proposed alterations, the Master proceeded to settle the conveyance according to the practice of the Court. And in case the Master adopted the proposed alterations, the costs of the proceedings were borne by the party preparing the draft.

Effect of appeal.

If an appeal was pending, the Master nevertheless proceeded to settle the conveyance, and only its execution was stayed (*r*).

Exceptions to Master's certificate.

Exceptions lay to the Master's certificate (*s*); but if no exceptions were filed the conveyance had to be executed by the parties (*t*).

New practice.

Under the present practice the Judge settles the draft in chambers; and (*u*) in any case of apparent difficulty, or where the draft is likely to be available as a precedent for others in the same cause or matter, generally requires it to be laid before one of the conveyancing counsel of the Court for his opinion. A certificate is given by the chief clerk approving of the draft as ultimately settled; and the approval of the Judge is signified by a memorandum written in the margin of the engrossment and signed by the chief clerk.

(*r*) *Gwynn* v. *Lethbridge*, 14 Ves. 585.

(*s*) *Lloyd* v. *Griffith*, 1 Dick. 103; *Wakeman* v. *Duchess of Rutland*, 3 Ves. 504; *Moxhay* v. *Inderwick*, 1 De G. & S. 708, 711.

(*t*) 1 Dan. Ch. Prac. by H. 1192.

(*u*) *Re Bennett*, 18 Jur. 33; *Harvey* v. *Brooke*, 9 Ha. Append. XI.

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Conveyance under the Trustee Act, 1850.

In various cases of necessary parties being under disabilities, a conveyance might, formerly, have been procured under the 1 Will. IV. c. 60, and 4 & 5 Will. IV. c. 23 (*x*); and now, under the 13 & 14 Vict. c. 60, the principal provisions of which (*y*) we have already noticed (*z*), the Court may declare any of the parties to the suit to be trustees within the Act, and vest their estate and interest in the purchaser (*a*).

Conveyance under 16 & 17 Vict. c. 70, in case of lunatic vendor.

And by the 16 & 17 Vict. c. 70, when any person having contracted to sell any land becomes lunatic, and the contract is not disputed, or is such as the Lord Chancellor thinks ought to be performed, or a specific performance of the contract, either wholly or so far as the same remains to be performed, has been decreed either before or after the lunacy, the committee of the estate of the lunatic may, in his name, and on his behalf, by direction of the Lord Chancellor, signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in the suit, on the petition of the party claiming the benefit of the contract with the lunatic, or any plaintiff in the suit, receive and give an effectual discharge for the money payable to the lunatic, or so much thereof as remains unpaid, and make such conveyance of the land to such person, and in such manner, as the Lord Chancellor may order; and such conveyance is to be as valid and legal, to all intents and purposes, as if the lunatic had been of sound mind, and had executed the same (*b*).

Conveyance how to be obtained when party refuses to convey.

Two modes of proceeding might formerly have been adopted when a party refused upon order to execute the necessary assurance. The first under the 1 Will. IV. c. 36 (*c*),

(*x*) See *In re Lowe's Estate*, 2 Ph. 690; and on the Acts generally, see Lewin on Trusts, 6th edit., p. 846, *et seq.*; Morgan's Chancery Acts, 76, *et seq.*; Dan. Ch. Prac. 1763, *et seq.*

(*y*) See, in particular, sect. 30, *suprà*, p 587.

(*z*) *Suprà*, p. 583, *et seq.*

(*a*) For form of such a declaration, with the consequent directions, see *Hargreaves* v. *Wright*, cited Seton, 616.

(*b*) Sects. 122, 139; see 13 & 14 Vict. c. 60, and General Orders in Lunacy of the 7th Nov., 1853, r. 56.

(*c*) See sect. 15, rule 15.

which authorized the Court to appoint one of the Masters to execute the Conveyance; but only when the recusant party had been in prison for two months (*d*): or, secondly, the party ordered to convey might, upon his refusal or default for twenty-eight days after tender of the conveyance, be treated as a trustee, and a conveyance might be obtained under the 1 Will. IV. c. 60, s. 8 (*e*). The Trustee Act, 1850, repealing the 1 Will. IV. c. 60, contains, as we have seen, an express provision authorizing the Court to declare that any of the parties to a suit for specific performance are trustees within the meaning of the Act, and to make a similar declaration as respects unborn persons in certain cases (*f*); and in cases coming within its provisions, has superseded, although it does not repeal, the 1 Will. IV. c. 36 (*g*).

Interest on money refunded on appeal, not generally allowed.

We may here remark, that where money has been paid under a decree or order, which is reversed on appeal, interest will not be allowed except by special direction (*h*): but where money has been recovered at Law, Equity, in decreeing its re-payment, has also given interest (*i*).

***Ne exeat*, when granted.**

If the purchaser have accepted the title (*k*), or the title have been established in a suit against him for specific performance (*l*), a writ of *ne exeat regno* will lie against him, if it can be collected that he intends to go abroad before paying the purchase-money (*m*): and this, although his intended absence cannot be attributed to the purpose of avoiding payment (*n*); and although he may be leaving behind him property sufficient to answer the demand (*o*): and the writ will be marked for the full amount of the purchase-money (*p*).

(*d*) See 9 Beav. 275.

(*e*) See *Warburton* v. *Vaughan*, 4 Y. & C. 247; *Thomas* v. *Gwynne*, 9 Beav. 275.

(*f*) 13 & 14 Vict. c. 60, s. 30.

(*g*) See Seton, p. 688.

(*h*) *Parker* v. *Morrell*, 2 Ph. 469; and see 3 Y. & C. 131.

(*i*) *Young* v. *Guy*, 8 Beav. 147.

(*k*) *Goodwin* v. *Clarke*, 2 Dick. 497; and *Jackson* v. *Petrie*, 10 Ves. 164.

(*l*) See *Raynes* v. *Wyse*, 2 Mer. 472; *Morris* v. *M'Neil*, 2 Russ. 604.

(*m*) *Boehm* v. *Wood*, Turn. & R. 332.

(*n*) See Turn. & R. 345; *Stewart* v. *Graham*, 19 Ves. 313.

(*o*) See Turn. & R. 338; Dan. Ch. Prac. 1538.

(*p*) *Boehm* v. *Wood*, Turn. & R 332.

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Vendor's remedy for payment of money.

If the purchaser fail to pay the money within the time named in the decree or order, an attachment may issue against him; or the vendor, if so disposed, may move to rescind the contract, and to dismiss the bill without costs (*q*): or he might, it is conceived, move for a resale of the property by the Court, and for the payment of the deficiency (if any) by the purchaser (*r*).

Decree dismissing vendor's bill—return of deposit when ordered.

Where the vendor's bill is dismissed for want of title, the Court in general will direct him, if he have received the deposit, to repay it with interest (*s*): or, if in the hands of the auctioneer, would probably direct the vendor to concur with the purchaser in an order for its payment (*t*): but where the vendor's bill was dismissed on the ground of laches, and without any decision on the question of title, Sir J. Wigram, V.-C., refused to order the return of the deposit; and intimated that such an order should only be made in cases where the decree dismissing the bill would entitle the purchaser to an injunction, if the vendor attempted to enforce his legal remedies upon the contract (*u*): so, where the vendor's suit for specific performance was dismissed without costs by the Court of Appeal, reversing a decision of the Court below, and the purchaser did not wish for any order for the return of the deposit, unless it was ordered to be repaid with interest, the Court made no order, and left the defendant to his remedy at Law (*v*).

The return of the deposit cannot, according to the present practice (*x*) be ordered when the purchaser's bill is dismissed; and in such a case the Court would seem to have no power under the 21 & 22 Vict. c. 27 to award damages to the purchaser, as compensation for the loss of his deposit.

(*q*) *Foligno* v. *Martin*, 16 Beav. 586.

(*r*) See *Nash* v. *The Worcester Commissioners*, 1 Jur. N. S. 973, V.-C. W.

(*s*) *Hayes* v. *Bailey*, cited Sug. 621; *Lord Anson* v. *Hodges*, 5 Sim. 227; *suprà*, p. 193.

(*t*) *Bryant* v. *Busk*, 4 [illegible], see p. 6; Dan. Ch. Prac. 1284, n.

(*u*) *Southcomb* v. *Bishop of Exeter*, 6 Ha., see p. 225; and see *Madeley* v. *Booth*, 2 De G. & S. 718, 722.

(*v*) *Rede* v. *Oakes*, 2 De G. Jo. & S. 518; L. J. Turner expressed no opinion.

(*x*) *Suprà*, p. 193.

But in a modern case V.-C. K. Bruce, in adhering to the rule, refused the vendor costs on his declining to return the deposit (*y*); and when the Judicature Act, 1873, comes into force, the Court, it is conceived, will have jurisdiction in any action, whether for the specific performance or rescission of the contract, to direct a return of the deposit where the purchaser would be entitled at law to recover it (*z*).

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Dismissal without prejudice.

If a bill is dismissed on grounds which would not in themselves be a defence to an action at Law, it does not appear to be necessary to express in the decree that the dismissal is without prejudice to the legal remedy (*a*). Where the dismissal is on a point not raised by the pleadings, the decree is made without prejudice to any other bill by the plaintiff (*b*).

Delivery of possession.

Where the decree or order directs that possession of the premises shall be delivered up, the party entitled to the possession, may, on its being refused, obtain the same by means of a writ of assistance (*c*).

(11.) *As to costs.*

Section 11.

As to costs.

Costs, as a general rule, are borne by unsuccessful litigant.

In Equity, as at Law, the party who fails is, *primâ facie*, liable to costs (*d*): and, although the question of costs rests entirely in the discretion of the Court (*e*), yet it is for the unsuccessful litigant to show (if he can) the existence of circumstances sufficient to negative his *primâ facie* liability (*f*); and the present disposition of the Courts appears to be, to adhere, with considerable strictness, to the general rule. It has been pointedly observed by Lord Cottenham, C., " Parties may have more or less reason for

(*y*) *Gee* v. *Pearse*, 2 De G. & S. 346.

(*z*) 36 & 37 Vict. c. 66. s. 24.

(*a*) See *Wedgwood* v. *Adams*, 8 Beav. 105.

(*b*) *Clay* v. *Rufford*, 5 De G. & S. 768.

(*c*) See Cons. Ord. XXIX. r. 5; Dan. Ch. Prac. 957, 1185; Seton, 1228, 1229.

(*d*) *Vancouver* v. *Bliss*, 11 Ves., see 463.

(*e*) Sug. 646; *Gerahty* v. *Malone*, 1 H. L. C. 81.

(*f*) *Vancouver* v. *Bliss*, *ubi suprà*.

coming here; but the question is, whether those who are right, or those who are wrong, are to pay the costs of their so doing. The rule I always act upon is, to order costs to be paid by those who are wrong" (*g*).

The cases upon the subject may be conveniently classified as follows, *viz.*:—

1st. Cases where the general rule, fixing the unsuccessful litigant with costs, is enforced with more than ordinary stringency:

2ndly. Cases where it is merely allowed to operate:

3rdly. Cases where it is modified, so as to deprive the successful litigant of his costs, wholly or in part:

And 4thly. Cases where the successful litigant is wholly or in part fixed with payment of costs.

Cases where general rule is enforced with more than ordinary stringency.

As to the 1st class of cases.—A vendor, obtaining a decree for specific performance, has been held entitled to costs on the special ground of the purchaser having persisted in an objection to the title which he knew had been decided against another purchaser in a former suit (*h*): so, where a bill is dismissed on the ground of misrepresentation (*i*), or fraud, or contains groundless imputations of moral (*k*), fraud against the defendant (*l*), or where the claim is dishonourable and contrary to moral equity (*m*), or against a clear stipulation in the contract (*n*), the dismissal will be with costs: so,

(*g*) *Hunter* v. *Nockolds*, 2 Ph. 545; and see *Green* v. *Briggs*, 6 Ha. 633; and *Earl Nelson* v. *Lord Bridport*, 10 Beav. 305; *Pattison* v. *Graham*, 2 Sm. & G. 211.

(*h*) *Biscoe* v. *Wilks*, 3 Mer. 456.

(*i*) *Buxton* v. *Lister*, 3 Atk., see 387; *Vancouver* v. *Bliss*, 11 Ves. 463.

(*k*) See the conclusion of V.-C. Wigram's judgment in *Marshall* v. *Sladden*, 7 Ha. 444.

(*l*) Morgan and Davey on Costs, 73; *Scott* v. *Dunbar*, 1 Moll. 442, 460; *Langley* v. *Fisher*, 9 Beav. 90; see *Glascott* v. *Lang*, 2 Ph. 310, 322; *Knight* v. *Majoribanks*, 2 Mac. & G. 16; *Price* v. *Berrington*, 15 Jur. 999.

(*m*) *Davis* v. *Symonds*, 1 Cox, 402, 408, and other cases cited in Beames on Costs, 37.

(*n*) *Williams* v. *Edwards*, 2 Sim. 78, 83.

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where the unsuccessful litigant has acted fraudulently in the subject-matter of the suit, or has acted vexatiously, and refused fair offers of accommodation, the decree against him will generally be with costs (o).

Cases where general rule is allowed to operate.

As to the 2nd class of cases.—A purchaser resisting specific performance, on grounds which the Court considers clearly untenable, will not be relieved from costs because he acted under counsel's opinion (p); or even upon the recommendation of the master under the old practice (q): so, where he omitted to take a valid objection to the title which was not removed until after the bill was filed, and insisted on objections which the Court considered untenable, he was ordered to pay all the costs of the suit (r): so, where he is held by his conduct to have waived the usual reference as to the title (s), or any particular objection arising on the title (t), and he has rested his defence on the question of title, the decree against him will be with costs: so, where the vendor's bill is dismissed merely for want of title and the title is clearly bad, the decree against him is with costs (u), although he be merely a trustee for sale (x), or although the title have become defective through the accidental destruction of the deeds subsequently to the contract (y): so, where a purchaser had objected that a good title could not be shown unless certain accounts were taken, and, this being resisted, each party, filed a bill for specific performance, the Court,

(o) Morgan and Davey on Costs, 80; *Clowes* v. *Beck*, 2 De G. M. & G. 731; *Sherwin* v. *Shakespeare*, 17 Beav. 267; 5 De G. M. & G. 517; and see *Jones* v. *Farrell*, 1 De G. & Jo. 208.

(p) *Maling* v. *Hill*, 1 Cox, 186; and see *Firmin* v. *Pullin*, 12 Jur. 410, where it would appear that a trustee acting under advice was nevertheless fixed with costs; and *Peers* v. *Ceeley*, 15 Beav. 209; *Boulton* v *Beard*, 3 De G. M. & G. 608, where the fact of the trustees having acted on counsel's advice, though stated at the bar, does not appear to have been proved, and is not noticed in the judgments; see Lewin, 306.

(q) *Earl Nelson* v. *Lord Bridport*, 10 Beav. 305.

(r) *Bridges* v. *Longman*, 24 Beav. 27.

(s) *Fleetwood* v. *Green*, 15 Ves. 595; *Margravine of Anspach* v. *Noel*, 1 Madd. 317.

(t) *Burnell* v. *Brown*, 1 J. & W. 175.

(u) *Walters* v. *Pyman*, 19 Ves. 351; *Playford* v. *Hoare*, 3 Y. & J. 175; *Blosse* v. *Lord Clanmorris*, 3 Bli. 62.

(x) *Suprà*, p. 85.

(y) *Bryant* v. *Busk*, 4 Russ. 1, 5.

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holding the purchaser to be right, made a decree in the second suit, and gave him the costs of both suits (z).

But in one case where there was a substantial objection to the title, which the vendor ought to have known, but which the purchaser did not discover until after the institution of the suit, the Court, although it overruled all the purchaser's objections to the title which were the immediate cause of the litigation, refused the vendor his costs (a).

Cases where general rule is modified so as to deprive successful litigant of costs, wholly or in part.

As to the 3rd class of cases (b).—A vendor obtaining a decree, has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title (c): so, a vendor has been refused costs where the purchaser's objection to the title, although overruled, has been considered a fair objection (d); or has been overruled merely on the authority of an unreported decision (e); or has been occasioned by the vendor or his solicitor (f); or has arisen from a mutual misunderstanding (g): so, where the title was not clear on the abstract as delivered before bill filed (h); or the vendor has refused to furnish necessary evidence in support of the title (although the purchaser's requisitions embraced unnecessary evidence) (i); or where he has obtained a decree on the ground of the purchaser's acquiescence in a voidable contract (k).

So, the dismissal of the vendor's bill has been without costs, in cases where the dismissal was merely on the ground

(z) *Barton* v. *Todd*, and *Todd* v. *Gee*, 1 Sw. 255, 262.

(a) *Phillipson* v. *Gibbon*, L. R. 6 Ch. Ap. 428.

(b) See Beames on Costs, 39.

(c) *M'Queen* v. *Farquhar*, 11 Ves. 482; *Sidebotham* v. *Barrington*, 5 Beav. 261.

(d) *Cox* v. *Chamberlain*, 4 Ves. 631; *Powell* v. *Martyr*, 8 Ves. 149; *Staines* v. *Morris*, 1 Ves. & B. 8; *Aislabie* v. *Rice*, 3 Madd. see 261; *Thorpe* v. *Freer*, 4 Madd. 466; see *M'Queen* v. *Farquhar*, 11 Ves. 482.

(e) *Corder* v. *Morgan*, 18 Ves. 344.

(f) See *Fenton* v. *Browne*, 14 Ves. 144, 150; *Dakin* v. *Cope*, 2 Russ. 175.

(g) *Calverley* v. *Williams*, 1 Ves. J. 210, 213.

(h) *Anon.* v. *Collinge*, 3 Ves. & B. 143, n.; *Wilson* v. *Clapham*, 1 Jac. & W. 36.

(i) *Newall* v. *Smith*, 1 Jac. & W. 263.

(k) *Dickenson* v. *Heron*, cited Sug. 630, n., 649.

of his own *laches* in applying to the Court (*l*), or of the title being merely doubtful (*m*), or on the ground of agency being denied (*n*), or of the general inaccuracy of the transactions relied on as constituting the contract (*o*), or upon a ground of defence which the purchaser did not resort to until after the institution of the suit (*p*): so, where a purchaser had, in the first instance, by his acts, waived the time for completion, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon discovering that vacant possession could not be given according to stipulation, declined to complete (*q*): so, according to Lord St. Leonards, "if, after a bill filed for specific performance, the plaintiff, in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs" (*r*): so, the Court has, by way of compromise, refused to fix the vendor with costs, he on his part consenting to give up his legal right of action under the agreement (*s*).

So, a purchaser obtaining a decree for specific performance, has been refused his costs, on the ground of the inadequacy of the consideration (*t*): so, where a purchaser's bill for the performance of a contract alleged to arise out of correspondence, was dismissed on the ground of the language being equivocal and not clearly amounting to an agreement, costs were refused (*u*): so, where it was dismissed on the ground of delay, and the vendor had not objected to the delay (*x*):

(*l*) *Guest* v. *Homfray*, 5 Ves. 824.

(*m*) *Rose* v. *Calland*, 5 Ves. 189 *White* v. *Foljambe*, 11 Ves. 337, 352 *Willcox* v. *Bellaers*, Turn. & R. 491 *Mullings* v. *Trinder*, L. R. 10 Eq. 449; but see *Pyrke* v. *Waddingham* 10 Ha. 11.

(*n*) *Howard* v. *Braithwaite*, 1 Ves. & B. 202, 374; *Blore* v. *Sutton*, 3 Mer. 237; *Thornbury* v. *Bevill*, 1 Y. & C. C. C. 554.

(*o*) *Marquis Townshend* v. *Stangroom*, 6 Ves., see 341.

(*p*) *Winch* v. *Winchester*, 1 Ves. & B. 380; and see 3 Y. & C. 517.

(*q*) *Nokes* v. *Lord Kilmorey*, 1 De G. & S. 444; and see *Deverell* v. *Lord Bolton*, 18 Ves. 505, 514; *suprà*, p. 429.

(*r*) Sug. 654, referring to *Western* v. *Perrin*, 3 Ves. & B. 197.

(*s*) *Buxton* v. *Lister*, 3 Atk. 387; and see 2 De G. & S. 346.

(*t*) *Burrowes* v. *Lock*, 10 Ves. 470.

(*u*) *Stratford* v. *Bosworth*, 2 Ves. & B. 348; and see 6 Ves. 341.

(*x*) *Firth* v. *Greenwood*, 1 Jur. N. S. 866.

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so, also, on the ground of the defendant having in his answer alleged fraud and circumvention, which he failed to prove (*y*), or having set up a false defence which the plaintiff has been obliged to disprove (*z*); so, also, on the ground of the hardship of the case, and the novelty of the point raised (*a*).

So, where the vendor has by a will subsequent to the contract devised the property to an infant, or in such a manner as to render a suit necessary, his estate must bear the costs (*b*): but if the will be prior to the contract it seems that no costs will be given (*c*). This distinction, which is now well established, does not seem to have been taken in some of the earlier cases, which were decided without reference to the date of the will (*d*). In a modern case, where a suit was rendered necessary by the vendor having, subsequently to the contract, devised the estate to infants who were also his co-heirs, and the purchaser, while desirous of completing the purchase, claimed exemption from payment of interest under the contract on the ground of delay on the vendor's part in making out his title, and the suit was instituted by the vendor's representatives, Lord Romilly decreed specific performance, and held the purchaser liable for the whole costs of the suit (*e*): but, on appeal, the purchaser was held to be wrongly charged with the costs, so far as the suit related to getting in the legal estate from the infants, and an apportionment was directed; L.J. Knight Bruce being of opinion that they ought to fall entirely on the vendor, and Lord Justice Turner that, under the special circumstances, no costs should be given (*f*). Where the vendor dies before the completion of the contract intestate, and leaving an infant

(*y*) *Thomas* v. *Phillips*, 11 Jur. 80, V.-C. K. B.

(*z*) *Field* v. *Churchill*, 4 Jur. 739, C.

(*a*) *Job* v. *Bannister*, 2 K. & Jo. 382; affirmed 5 W. R. 177.

(*b*) *Purser* v. *Darby*, 4 K. & Jo. 41; *Sanderson* v. *Chadwick*, 2 N. R. 414.

(*c*) *London & S. W. R. Co.* v. *Bridger*, 4 N. R. 261.

(*d*) See *Wortham* v. *Lord Dacre*, 2 K. & Jo. 437, where the vendor's estate paid the costs, but the date of the will is not given; *Hinder* v. *Streeten*, 10 Ha. 18; *Bannerman* v. *Clarke*, 3 Drew. 632.

(*e*) *Williams* v. *Glenton*, 34 Beav. 528.

(*f*) *S. C.*, L. R. 1 Ch. Ap. 200; *vide suprà*, p. 128.

heir, it is now well settled that no costs are given of the necessary suit for specific performance (*g*).

So, where, after the contract, one of several vendors became of unsound mind, no costs of a suit to obtain a vesting order were given (*h*): so, if the purchaser elect to have his bill dismissed, upon its appearing that the vendor cannot make a title, the present practice seems to be to dismiss the bill without costs (*i*); unless, perhaps (*k*), his bill alleges that the vendor cannot make a title (*l*): so costs have been refused on the ground of delay in the commencement and prosecution of the suit (*m*).

And it has been held that, if a bill is correctly filed on the authority of a reported decision, there being no authorities in conflict with it, and such decision is reversed during the progress of the suit, the plaintiff may thereupon, on motion, dismiss his bill without costs (*n*): so, where the plaintiff has been misled by an oversight of the Court, as, *e.g.*, in not having seen what were the provisions of an Act of Parliament applicable to the case, he has been allowed, on motion, to dismiss his bill without costs, and without prejudice to his right to file a new bill (*o*): so, where the defendant puts an end to the subject matter of the suit;—as by surrendering a lease on a bill being filed for its assignment, and absconds (*p*).

(*g*) Morgan & Davey, 186; *Hanson* v. *Lake*, 2 Y. & C. C. C. 328; *Armitage* v. *Askham*, 1 Jur. N. S. 227; *Scott* v. *Scott*, 11 W. R. 766.

(*h*) *Cresswell* v. *Haines*, 8 Jur. N. S. 208.

(*i*) *Malden* v. *Fyson*, 9 Beav. 347; *Lewis* v. *Loxham*, 3 Mer. 429.

(*k*) See Sug. 646, n. (*c*); 3 Myl. & C. 710.

(*l*) *Nicloson* v. *Wordsworth*, 2 Sw. 365.

(*m*) *Thornhill* v. *Glover*, 3 Dru. & W. 195, 229; *Nunn* v. *Fabian*, L. R. 1 Ch. Ap. 35, 41.

(*n*) *Robinson* v. *Rosher*, 1 Y. & C. C. C. 7; and see *Lancashire R. Co.* v. *Evans*, 14 Beav. 529; *Sutton Harbour Commissioners* v. *Hitchins*, 1 De G. M. & G. 170; *Dyke* v. *Rendall*, 2 De G. M. & G. 220; *contrà* in Ireland, *Cronin* v. *Murphy*, 1 Ir. Ch. R. 233; see also, as to mutual mistake, *Broughton* v. *Lashmar*, 5 Myl. & C. 136.

(*o*) *Lister* v. *Leather*, 1 De G. & Jo. 361, 368.

(*p*) *Knox* v. *Brown*, 2 Bro. C. C. 186; and see *Goodday* v. *Sleigh*, 1 Jur. N. S. 201.

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Cases where, in contravention of general rule, successful litigant is made to pay costs.

As to the 4th class of cases.—It not unfrequently happens that the party obtaining a decree has been clearly in the wrong, during all or a part only of the litigation; and if so, he must, as a general rule, pay all or a proportionate part (q) of the costs of the suit: *e.g.*, in an exceptional case, where the plaintiff obtained a decree not in accordance with the prayer of his bill (r), he was made to pay the costs of the suit: so, "if a purchaser file a bill insisting that the vendor cannot make a title, he must pay the costs, whether he accept or refuse the title" (s): so, if a purchaser, being a plaintiff and aware of objections to the title, require a reference, and, on the chief clerk certifying against the title, agree to waive the objections, he must pay the costs of the unneccessary investigation (t): so, if prior to the filing of the vendor's bill, the contract was resisted merely on the ground of want of title, and no title was shown before bill filed, the plaintiff, although he obtain a decree, will have to pay the costs up to the time when he showed a title (u); unless, as we have seen, the purchaser has resisted specific performance solely on other grounds which are held to be untenable (x): but the vendor is liable to pay the costs until a good title is shown; and this, although the purchaser, by his answer, unsuccessfully insist on the alleged illegality or abandonment of the contract (y); or even the general costs of the suit (z) except such costs as have been occasioned by improper contentions or objections made or taken by the defendant in the course of the suit (a): so, where a vendor, when before the Master, abandoned the

(q) See *Farrow* v. *Rees*, 4 Beav. 25; *Freer* v. *Hesse*, 4 De G. M. & G. 505.

(r) *Mortimer* v. *Orchard*, 2 Ves. jun. 243.

(s) Sug. 616, citing *Nicloson* v. *Wordsworth*, 2 Sw. 365, but with a query; a case before the Master under the old practice.

(t) *Bennett* v. *Fowler*, 2 Beav. 302. But *secus* where no abstract is produced until the parties are in Chambers, though the only defect is one previously known to the purchaser, *Wilson* v. *Williams*, 3 Jur. N. S. 810.

(u) *Wilson* v. *Allen*, 1 Jac. & W. 623; *Lewin* v. *Guest*, 1 Russ. 330; Sug. 650; *Wilkinson* v. *Hartley*, 15 Beav. 183, 188.

(x) *Bridges* v. *Longman*, 24 Beav. 27.

(y) *Smith* v. *Leigh*, Sug. 648; but the purchaser will not be allowed the extra costs occasioned by this unsuccessful defence, *S. C.*

(z) *Knight* v. *Harden*, Beames on Costs, 38; *Townsend* v. *Champernowne*, 3 Y. & C. 528.

(a) *S. C.* *Weddall* v. *Nixon*, 17 Beav. 160.

ground on which he had previously relied, but established his title on another ground, and the Master reported generally in favour of the title, the purchaser was allowed the costs of the reference and the several applications to the Court (*b*): and, as a general rule, if a party having committed an unintentional error offers to the aggrieved party all that he is entitled to, and this is refused, such refusal, and not the original error, must, for the purpose of determining the liability to costs, be considered to be the cause of any subsequent litigation (*c*). But the rule will not prevail where the purchaser, by resisting the contract on grounds other than of title (*d*), or by his improper conduct (*e*), or claim (*f*), has occasioned the litigation; or where, insisting on other objections, he has not accepted the vendor's offer to procure evidence which, if produced, would have perfected the title (*g*): and where a good title was not shown until after the institution of the suit, by the production of evidence which had not been previously required, and was not the cause of dispute, the purchaser who had insisted on untenable objections, was ordered to pay all the costs of the vendor's suit (*h*). In one case, where the plaintiff had agreed to grant a lease as if he were owner in fee simple, being, in fact, as to part of the property, only entitled as lessee, and his title was not disclosed until after the institution of the suit, his bill for specific performance was dismissed with costs, notwithstanding that the intending lessee had primarily

(*b*) *Fielder* v. *Higginson*, 3 Ves. & B. 142; *Harrison* v. *Coppard*, 2 Cox, 318.

(*c*) See and consider *Cordingley* v. *Cheeseborough*: on appeal, 4 De G. F. & J. 379, 383, and judgment.

(*d*) *Croome* v. *Lediard*, 2 Myl. & K. 293; *Scoones* v. *Morrell*, 1 Beav. 251; *Taylor* v. *Brown*, 2 Beav. 180; *Abbott* v. *Sworder*, 4 De G. & S. 448; *Abbott* v. *Calton*, 22 L. J. 936; *Peers* v. *Sneyd*, 17 Beav. 151; *Carrodus* v. *Sharp*, 20 Beav. 56; but see Sug. 651, 652.

(*e*) *Oxenden* v. *Lord Falmouth*, cited Sug. 650.

(*f*) *Wyville* v. *Bishop of Exeter*, 1 Pri. 292; *Fife* v. *Clayton*, 13 Ves. 546; 1 C. P. C. N. R. 351 (costs of cross bill filed unnecessarily); and see *M'Nicoll* v. *Kay*, 28 L. J. (Ch.) 20.

(*g*) *Long* v. *Collier*, 4 Russ. 269; *Holwood* v. *Bailey*, *ib.* 271; *Townsend* v. *Champernowne*, 3 Y. & C. 520; *Monro* v. *Taylor*, 8 Ha. 70; affirmed 3 Mac. & G. 713.

(*h*) *Bridges* v. *Longman*, 24 Beav. 27; and see V.-C. Wood's statement of the rule, *Lyle* v. *the Earl of Yarborough*, Johns. 70, 77; *Murrell* v. *Goodyear*, 6 Jur. N. S. 356.

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So, if a purchaser file a bill for specific performance with an abatement of purchase-money, the question of abatement being the only one in dispute, if he fail upon this point the decree for specific performance will give costs against him (*k*): so, also, where the question of compensation is the only material one in dispute, and the vendor's non-compliance with a requisition made before the bill was filed is attributable to the unfounded claim for compensation, the purchaser must pay the costs of the suit, so far as it relates to that claim (*l*); but, as a general rule, where a purchaser obtains a decree for specific performance with compensation, it will be with costs (*m*). We may here observe that where the question of compensation is the only one in dispute, the 9th section of the 37 & 38 Vict. c. 78, affords a convenient mode of determining it, without resorting to a suit.

So, if the successful litigant introduce upon the pleadings unfounded allegations affecting the character (*n*) of his opponent, he will have to pay the costs thereby occasioned (*o*). But where the Court, merely on the ground of the personal hardship of the case as against the defendant, refuses to enforce specific performance, and dismisses the bill, it will not make him pay the plaintiff's costs (*p*).

Where a purchaser sets up a defence which prevents the plaintiff from obtaining the usual reference of title on motion, and fails to establish it, he may be at once directed to pay

(*i*) *Baskcomb* v. *Phillips*, 6 Jur. N. S. 363.

(*k*) *Fewster* v. *Turner*, 6 Jur. 144, V.-C. W.; *White* v. *Cuddon*, 8 Cl. & F. 766.

(*l*) *Lyle* v. *Earl of Yarborough*, Johns. 70; see, too, *Williams* v. *Edwards*, 2 Sim. 78.

(*m*) *Leyland* v. *Illingworth*, 2 De G. F. & Jo. 248; *Gedye* v. *Duke of Montrose*, 26 Beav. 45.

(*n*) See 7 Ha. 444.

(*o*) *Wright* v. *Howard*, 1 Sim. & St., see 205; *Bower* v. *Cooper*, 2 Ha. 408; see *Thomas* v. *Phillips*, 11 Jur. 80, V.-C. K. B.

(*p*) *Wedgwood* v. *Adams*, 8 Beav. 103.

costs up to and inclusive of the hearing, without regard to the result of the reference (*q*).

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Costs, when defendant submits to plaintiff's demand.

Where the defendant submits to the whole demand of the plaintiff, and to pay costs, he may at once stop all further proceedings (*r*); and, if the question of liability to costs be the only one remaining in dispute, it has been held that the proper course is, to apply to the Court by motion or petition (*s*); and where a plaintiff omitted so to do, but brought the cause to a hearing, the Court refused him any costs subsequent to the time at which his original demand had been submitted to (*t*). It was, however, unwillingly held by V.-C. K. Bruce, that this course could not, without the defendant's consent, be adopted before answer; inasmuch as he had a right to put in his answer, and to read it on the question of costs at the hearing (*u*); and in a later case (*x*) the same judge refused a similar application by a plaintiff after answer; but merely on the ground of the novelty of the proceeding: and where the defendant by an agreement for compromising the suit had admitted his liability to costs, and failed to fulfil the agreement, but subsequently satisfied the plaintiff's demand except in respect of costs, Lord Langdale, upon motion before answer, ordered their payment (*y*). The rule, however, has been settled by a decision of the Court of Appeal, in which it was laid down that the Court will not, on motion by the plaintiff to stay proceedings, order the defendant to pay the costs of the suit,

(*q*) *Hyde* v. *Dallaway*, 4 Beav. 606.

(*r*) *Damer* v. *Earl of Portarlington*, 2 Ph. 30; *Sivell* v. *Abraham*, 8 Beav. 598, and cases there cited; *Lill* v. *Robinson*, Beat. 85; *Sawyer* v. *Mills*, 1 Mac. & G. 390; *Hennet* v. *Luard*, 12 Beav. 479.

(*s*) *Sivell* v. *Abraham*, *ubi suprà*; *Winter* v. *Vizitelli*, 36 Leg. Ob. 53, V.-C. S.; *Price* v. *Corp. of Penzance*, 4 Ha. 506; *Tapp* v. *Tanner*, 20 L. J. 559, M. R. *Sed vide infrà*.

(*t*) *Sivell* v. *Abraham*, 8 Beav. 598; and see *Hennet* v. *Luard*, 12 Beav. 479; *Sentance* v. *Porter*, 13 Jur. 980; V.-C. W.; and see *Woodward* v. *Miller*, 16 L. J. N. S., V.-C. K. B. 16; *North* v. *G. N. R. Co.*, 2 Giff. 64; *Nicholls* v. *Elford*, 5 Jur. N. S. 264; *Tompson* v. *Knight*, 7 Jur. N. S. 704; *Wilde* v. *Wilde*, 10 W. R. 368, reversed, *ib.* 503.

(*u*) *Langham* v. *Great Northern R. Co.*, 1 De G. & S. 505.

(*x*) *M'Naughton* v. *Hasker*, 12 Jur. 956. See, too, *Burgess* v. *Hill*, 26 Beav. 244; *Wallis* v. *Wallis*, 4 Drew. 458.

(*y*) *Tapp* v. *Tanner*, 20 L. J. Ch. 559.

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unless by consent (*z*); Lord Justice Turner remarking that the case of *Sivell* v. *Abraham* had been misunderstood, and that all that was there decided was, that a plaintiff might apply to the Court to stay proceedings, and order the defendant to pay the costs of the suit; and that, if the defendant made no objection, the suit might be disposed of in that way. In one case, V.-C. Stuart, while refusing the motion as irregular, made the costs of it costs in the cause, as "being a well meant endeavour on the part of the plaintiffs to put an end to a useless litigation" (*a*).

When defendant disclaiming is entitled to costs.

It was laid down (*b*) by Sir J. Wigram, V.-C., as a general rule, that where a defendant so disclaims as to show that he had no interest in the property *when the bill was filed*, he is entitled to his costs (*c*): but where he is properly brought before the Court in respect of an interest at the *time the bill was filed*, and then says, "I now abandon my interest," it is a question of discretion with the Court either to order the plaintiff to pay the defendant's costs or not; with reference to the circumstances which may have rendered the suit necessary or proper (*d*). In a later case (*e*) the rule was thus stated by Lord Romilly: First, where a defendant disclaims in such a manner as to show that he never had, and never claimed, an interest, at or after the filing of the bill, then he is entitled to his costs; secondly, if a defendant having an interest, shows that

(*z*) *Wilde* v. *Wilde*, 10 W. R. 503, overruling *S. C. ib.* 368; and see *Morgan* v. *G. E. R. Co.*, 1 H. & M. 78, where this decision was reluctantly followed. See, too, Dan. Ch. Pr. 1263.

(*a*) *The Ventilation and Sanitary Improvement Co.* v. *Edelsten*, 2 N. R. 53.

(*b*) *Gabriel* v. *Sturgis*, 5 Ha. 101; and see *Appleby* v. *Duke*, 1 Ha. 303; *Grig* v. *Sturgis*, 5 Ha. 93.

(*c*) See *Glover* v. *Rogers*, 11 Jur. 1000, R.

(*d*) See *Ohrly* v. *Jenkins*, 1 De G. & S. 543; *Staffurth* v. *Pott*, 2 De G. & S. 571; *Benbow* v. *Davies*, 11 Beav. 369; *Fewster* v. *Turner*, 6 Jur. 144, V.-C. W.; *Gurney* v. *Jackson*, 1 Sm. & G. 97; *Ford* v. *White*, 16 Beav. 120; *Ford* v. *Lord Chesterfield*, 16 Beav. 516; *Lock* v. *Lomas*, 15 Jur. 162; *Williams* v. *Lomas*, 16 Jur. pt. 2, p. 94; *Hiorns* v. *Holton*, 16 Jur. 1077; *Hurst* v. *Hurst*, 22 L. J. 546.

(*e*) *Ford* v. *Chesterfield*, 16 Beav. 516; and see *Bellamy* v. *Brickenden*, 4 K. & Jo. 670, where Lord Romilly's statement of the rule is approved by V.-C. W.

he disclaimed, or offered to disclaim, before the institution of the suit, there also he is entitled to his costs (*f*); and thirdly, that where a defendant, having an interest, allows himself to be made a party to the suit, and does not disclaim, or offer to disclaim, till he puts in his answer or disclaimer, in that case he is not entitled to his costs.

Where a defendant has never claimed any interest, it is not necessary, in order to entitle him to his costs, that he should have given notice of his intention to disclaim before the bill was filed (*g*); but if he omit to say that he never claimed, the dismissal will be without costs (*h*); so also, where he simply alleges that he was applied to before suit, and did not "refuse" to disclaim (*i*), or that if he had been applied to he would have released his interest (*k*). A person who is properly made a defendant ought to offer to be dismissed without costs; and if the suit is persevered in against him, he will, in such case, be entitled to his subsequent costs (*l*). Where a party improperly refuses either to claim or disclaim, and simply remains passive, he may, it seems, be ordered to pay costs (*m*).

Vendor obtaining title pending suit.

Where a vendor, having a bad title, files a bill for specific performance, and his title is perfected pending the suit, it is his duty to offer to the purchaser his costs up to that time, and to give him a conveyance (*n*).

Possession—how far important.

In general, a purchaser is less favoured on the question of costs when he has taken possession of the estate before the title is made out: but this does not apply to cases where, according to the contract, possession is to be taken before a

(*f*) See *Ward* v. *Shakeshaft*, 1 Dr. & S. 269.

(*g*) *Bellamy* v. *Brickenden*, 4 K. & Jo. 670.

(*h*) *Ohrly* v. *Jenkins*, 1 De G. & S. 543.

(*i*) *Harrison* v. *Pennell*, 4 Jur. N.S. 682.

(*k*) *Collins* v. *Shirley*, 1 R. & M. 638; but see *Gurney* v. *Jackson*, 1 Sm. & G. 97.

(*l*) See *Talbot* v. *Kemshead*, 4 K. & Jo. 93; *Davies* v. *Whitmore*, 28 Beav. 617.

(*m*) *Re Primrose*, 23 Beav. 590, see judgment.

(*n*) *Freer* v. *Hesse*, 4 De G. M. & G. 505.

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title is shown; or where it is taken at the instance of the vendor (*o*). A purchaser who, for many years, retained possession without payment, and refused either to vacate the contract or accept the title, was fixed with the costs of a suit by the vendor, although the title was ascertained to be defective (*p*).

Deposit, not set off against costs.

Where the Court has actually dismissed a purchaser's bill with costs, it will not, on a subsequent application, allow him to set off against them the deposit paid to the vendor, but will leave him to his legal right (*q*); but the Court, as we have seen, has refused to give costs unless the vendor would return the deposit (*r*).

Costs of case sent to Law.

Where a defendant, a purchaser, asked for a case to be sent to a Court of Law, which was granted, and the opinion of the Judges was against him, but ultimately the bill was dismissed with costs upon another ground, he was allowed his costs at Law as well as in Equity (*s*): but, in other cases, the costs of what may be termed collateral litigation, have either been refused, or have been thrown upon the party failing therein, although held entitled to the general costs of the suit (*t*). It would appear that, as a general rule, such costs are not included in a mere order for payment of the costs of the suit (*u*).

Costs of action at Law.

And it is laid down by Lord St. Leonards, as a general rule, "that either party resorting to Law, where the equity is against him, will be fixed with the costs of the action" (*x*); but the *primâ facie* right of the other party to such costs

(*o*) See *Vancouver* v. *Bliss*, 11 Ves. 458, see 464.

(*p*) *King* v. *King*, 1 Myl. & K. 442.

(*q*) *Williams* v. *Edwards*, 2 Sim. 84.

(*r*) *Gee* v. *Pearse*, 2 De G. & S. 346.

(*s*) *Forbes* v. *Peacock*, 12 Sim. 528; the Vice-Chancellor's decision on the general merits was reversed by Lord Lyndhurst, 1 Ph. 717.

(*t*) See *Townsend* v. *Champernowne*, 3 Y. & C., c. see 528; *Smith* v. *Leigh*, V.-C. 1821, cited Sug. 648; *Grove* v. *Bastard*, 1 De G. M. & G. 69; but see *Mackrell* v. *Hunt*, 2 Madd. 34, 37, n.

(*u*) *Salkeld* v. *Johnston*, 1 Mac. & G. 583.

(*x*) Sug. 653, *Staines* v. *Morris*, 1 Ves. & B. 16.

may be lost by his neglecting to resort to Equity so soon as the action is commenced at Law (*y*). Chap. XVIII. Sect. 11.

No interest payable on costs refunded.

Where either party has received costs under an order or decree which is subsequently reversed on appeal, he will not, in repaying such costs, be compelled to pay interest upon them (*z*).

Mortgagee refused costs of unsuccessful suit.

A mortgagee has been refused, as against the mortgaged estate, his costs of an unsuccessful suit against a purchaser for specific performance, although instituted under the best advice (*a*).

Solicitor's lien on purchase-money.

In one case an order is stated to have been made on the petition of the vendor's solicitor, restraining the vendor from receiving, and the purchaser from paying, the purchase-money, until the solicitor's lien for costs was satisfied (*b*).

Costs where the suit might have been instituted in the County Court.

Where the suit might have been commenced in the County Court under the Acts conferring an equitable jurisdiction upon County Courts, it has been held that the plaintiff, if he succeed, is only entitled to such costs as he would have obtained in the County Court (*c*); unless there are special circumstances which render it desirable to have recourse to the Court of Chancery (*d*): but in a recent case Sir George Jessell, M. R., held that the acts impose no restriction on a plaintiff in his choice of a tribunal; and that if he comes into Chancery, he is not to be deprived of his costs merely because he might have sued in the County Court (*e*).

(*y*) *Grover* v. *Hugell*, 3 Russ., see 433.

(*z*) *Small* v. *Attwood*, 3 Y. & C. 131; and see 2 Ph. 469.

(*a*) *Peers* v. *Ceeley*, 15 Beav. 209.

(*b*) *Birch* v. *Padmore*, cited 1 Jur. N. S. 123, and as *Bovil* v. *Padmore*, 7 De G. M. & G. 27.

(*c*) *Simons* v. *McAdam*, L. R. 6 Eq. 324; a case of foreclosure. And see a case before V.-C. W. referred to in *Scotto* v. *Heritage*, L. R. 3 Eq. 212.

(*d*) See *Scotto* v. *Heritage*, *ubi suprà*.

(*e*) *Brown* v. *Rye*, L. R. 17 Eq. 343.

The following classification of several cases where titles have, upon questions of construction, law, or fact, been considered by Courts of Equity, to be good, or bad, or too doubtful to be forced upon a purchaser, may be found of use.

1. *Construction*—Title held good on

questions of :—*Warneford* v. *Thompson*, 3 Ves. 513, obscure power of sale: *Jones* v. *Price*, 11 Sim. 557 ; *Lane* v. *Debenham*, 17 Jur. 1005, 11 Ha. 188, power of sale in surviving trustee : *Lord Rendlesham* v. *Meux*, 14 Sim. 249, discretionary power of sale : *Mather* v. *Norton*, 21 L. J. 15, V.-C. P., validity of power of sale: *Young* v. *Roberts*, 15 Beav. 558; *Saloway* v. *Strawbridge*, 1 Kay & J. 371; affirmed 7 De G. M. & G. 594; *Hind* v. *Poole*, 1 Kay & J. 383 ; *Tracey* v. *Lawrence*, 2 Dre. 403, validity of mortgage power of sale: *Hamilton* v. *Buckmaster*, power of sale in executor over real estate : *Hall* v. *May*, 3 K. & Jo. 505 ; *Stevens* v. *Austin*, 7 Jur. N. S. 373, competency of devisee of surviving trustee to make good title : *Balfour* v. *Welland*, 16 Ves. 151, competency of trustees to give discharges for purchase-money (and see cases cited *suprà*, Ch. XIII. s. 5) : *Peed* v. *Sneyd*, 17 Beav. 151, power of agent to contract to grant lease: *Lord Braybroke* v. *Inskip*, 8 Ves. 417; *Rushton* v. *Craven*, 12 Pri. 599 ; *Jenkins* v. *Herries*, 4 Madd. 67 ; *Wood* v. *Richardson*, 5 Jur. 623 ; *Clonmert* v. *Whittaker*, 2 Jarm. Wills. 2nd edition, 386 ; *Beaumont* v. *Lord Salisbury*, 19 Beav. 198, what estate taken under will or settlement : *Fillingham* v. *Bromley*, Turn. & R. 530, clause of forfeiture for non-residence : *Nichols* v. *Hawkes*, 10 Ha. 342, duration of annuity charged on estate.

2. *Construction*—Title held bad or doubtful on questions of :—*Sheffield* v. *Lord Mulgrave*, 2 Ves. J. 525, whether lease for lives passed by will, or devolved on heir as special occupant : *Willcox* v. *Bellaers*, Turn. & R. 491, and see *Pyrke* v. *Waddingham*, 10 Ha. 1 (but see *Mullings* v. *Trinder*, L. R. 10 Eq. 449); *Freer* v. *Hesse*, 4 De G. M. & G. 495 ; *Goldney* v. *Crabb*, 19 Beav. 338, whether devisee gave an estate tail : *Playford* v. *Hoare*, 3 Y. & J. 175, estate taken under will, whether legal or equitable, so as to let in the rule in *Shelley's case* : *Colmore* v. *Tindal*, 2 Y. & J. 605, legal estate where vested under limitations in a settlement (but see *Beaumont* v. *Lord Salisbury*, 19 Beav. 198) : *Okeden* v. *Clifden*, 2 Russ. 309, whether a general devise of estates "in the kingdom of England" passed an estate in Wales : *Sharp* v. *Adcock*, 4 Russ. 374, whether the fee passed by a devise without words of inheritance : *Rogers* v. *Waterhouse*, 4 Drew. 329, whether the fee passed under the word "estate:" *Nicholson* v. *Wright*, 5 W. R. 431, as to validity of appointment of new trustees : *Ashton* v. *Wood*, 3 Jur. N. S. 1164, 3 Sm. & G. 436 ; *Stevens* v. *Austen*, 7 Jur. N. S. 873, as to competency of devisee of surviving trustee to make a good title : *Collier* v. *McBean*, L. R. 3 Eq. 323, L. R. 1 Ch. Ap. 81, estate taken by trustees under a will : *Cooper* v. *Denne*, 4 Bro. P. C. 80, and 1 Ves. J. 565, construction of leasing power : *Crewe* v. *Dicken*, 4 Ves. 97 ; and *Wilson* v. *Bennett*, 5 De G. & S. 475, power to sell and give receipts : *Price* v. *Strange*, 6 Madd. 159, meaning of the expression "legal representative or representatives:" *Casamajor* v. *Strode*, 2 Myl. & K. 706, construction of inclosure act : *Earl of Lincoln* v. *Arcedeckne*, 1 Coll. 98, extent of descriptive words in schedule to private act: *Nouaille* v. *Flight*, 7 Beav. 521, extent of covenants.

3. *Law*—Titles held good on questions of :—*Burnaby* v. *Griffin*, 3 Ves. 271, and *Nouaille* v. *Greenwood*, Turn. & R. 26, validity of recovery : *Vick* v. *Edwards*, 3 P. Wms. 372, title by fine and estoppel : *Walker* v. *Bentley*, 9 Ha. 629, merger of tithe : *Smith* v. *Death*, 5 Madd, 371, extinguishment of power of appointment by a recovery : *Stanhouse* v. *Gaskell*, 17 Jur. 157, title depending on doctrine of election : *Lutwytch* v. *Winford*, 2 Bro. C. C. 248, excessive sale by Court : *Powell* v. *Powell*, 6 Madd. 53, non-joinder of infants on sale by

Court: *Bishop of Winchester* v. *Payne*, 11 Ves. 194, effect of decree of foreclosure on mortgage, incumbrancers not being parties to suit: *Edgworth* v. *Edgworth*, 12 Ir. Eq. 81, validity of sale of terms for raising charges, as against infant tenant in tail in remainder: *Dykes* v. *Taylor*, 16 Sim. 563, power of Master to sell before report: *Poole* v. *Shergold*, 1 Cox, 160, extent, by Crown, in hands of sheriff, unexecuted, and debt compromised: *Lord Braybroke* v. *Inskip*, 8 Ves. 417, sufficiency of general release: *Hume* v. *Bentley*, 5 De G. & S. 523, performance or waiver of breach of covenant: *Bridges* v. *Longman*, 24 Beav. 27, waiver by receipt of rent: *Havens* v. *Middleton*, 10 Ha. 641, sufficiency of insurance: *Currie* v. *Nind*, 1 Myl. & C. 17; and *Butterfield* v. *Heath*, 15 Beav. 408, title against voluntary conveyance: *Prosser* v. *Watts*, 6 Madd. 59, non-production of early deeds: *Ex parte Holland*, 4 Madd. 483, validity of bargain and sale of copyholds, from commissioners in bankruptcy, direct to purchaser: *Minet* v. *Leman*, 20 Beav. 269, 7 De G. M. & G. 340, validity of exchange of land of different tenures by Inclosure Commissioners: *Lodge* v. *Lysely*, 4 Sim. 70, validity of power of sale, as against subsequent judgments: *Biddle* v. *Perkins*, 4 Sim. 135; *Powis* v. *Capron*, *ib.* 138, n., and *Nelson* v. *Callow*, 15 Sim. 353, validity of unlimited power of sale: *Russell* v. *Plaice*, 18 Beav. 21, validity of power of sale in mortgage by administratrix; and see *Selby* v. *Cooling*, 23 Beav. 418; *Bridges* v. *Longman*, 24 Beav. 27; *Re Chawner's will*, L. R. 8 Eq. 569, *Cruikshank* v. *Duffin*, L. R. 13 Eq. 555, and *suprà*, p. 78 (but see *Sanders* v. *Richards*, 2 Coll. 568; and *Whitmore* v. *Drake*, 19 L. T. 243, where the Court refused to insert a power of sale in a mortgage; and *Clarke* v. *Royal Panopticon Co.*, 4 Drew. 26): *Bradshaw* v. *Fane*, 3 Drew. 534, title under partition: *Glass* v. *Richardson*, 2 De G. M. & G. 658, validity of power to appoint copyholds: *Peppercorn* v. *Wayman*, 5 De G. & S. 230, that copyholds are within the 21 Hen. VIII. c. 4, authorizing sale by acting executors: *Kerr* v. *Pawson*, 25 Beav. 394, effect of enfranchisement under the Copyhold Acts: *Falkner* v. *Equitable Reversionary Interest Society*, 4 Drew. 352, power of mortgagee to sell under special conditions: *Drayson* v. *Pocock*, 4 Sim. 283, power of trustees appointed by Court to give receipts: *Howard* v. *Ducane*, Turn. & R. 81; *Dicconson* v. *Talbot*, L. R. 6 Ch. Ap. 32, validity of sale to tenant for life whose consent was required to any exercise of the power: *Adams* v. *Taunton*, 5 Madd. 435, power of trustees, accepting trust, to give receipts without the concurrence of renouncing trustee: *West* v. *Berney*, 1 Russ. & M. 451, validity of settlement by donee of power of appointment and an object of the power: *Walmsley* v. *Jowett*, 23 L. J. 425, extinguishment of power (and see *Moody* v. *Walters*, 16 Ves. 283, 312; *Biscoe* v. *Perkins*, 1 V. & B. 485, 493): *Hasker* v. *Sutton*, 2 S. & S. 573, title founded on destruction of contingent remainders: *Mole* v. *Smith*, Jac. 490, term to be relied on as a sufficient protection against dower: *Scoones* v. *Morrell*, 1 Beav. 251, presumption as to ownership of strips of waste: *Clarke* v. *Royle*, 3 Sim. 499, whether a covenant by a prior purchaser to pay the then vendor an annuity created a lien on the estate.

4. *Law*—Titles held bad or doubtful on questions of:—*Rose* v. *Colland*, 5 Ves. 186, lay impropriator barred by non-payment of tithes: *Shapland* v. *Smith*, 1 Bro. C. C. 75, validity of recovery: *Blosse* v. *Lord Clanmorris*, 3 Bli. 62, validity of recovery as against reversion in the Crown: *Stewart* v. *Marq. Conyngham*, 1 Ir. Ch. R. 535, effect of a fine: *Jervoise* v. *Duke of Northumberland*, 1 Jac. & W. 559, trust, whether executed or

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executory, and whether an estate tail: *Sloper* v. *Fish*, 2 V. & B. 145, whether a deed operated as an escrow: *Wheate* v. *Hall*, 17 Ves. 80, validity of power of sale introduced in settlement under decree: *Macdonald* v. *Walker*, 14 Beav. 556, validity of exercise of power of sale by devisee: *Blacklow* v. *Laws*, 2 Ha. 40, premature sale under power: *Collard* v. *Sampson*, 4 De G. M. & G. 224, effect of 1 Vict. c. 26, on execution of power, and see an Article xi. Jur. N. S. 107: *Wolley* v. *Jenkins*, 23 Beav. 53, extinguishment of power; *Bradshaw* v. *Fane*, 3 Drew. 534, whether the ordinary power of sale and exchange authorizes a partition: *Cruse* v. *Nowell*, 2 Jur. N. S. 536, validity of exercise of power of sale after a sub-mortgage, and *vide suprà*, p. 56; *Langford* v. *Selmes*, 3 K. & Jo. 220, in estoppel: *Calvert* v. *Godfrey*, 6 Beav. 97, and *Garmstone* v. *Gaunt*, 1 Coll. 577, 582, jurisdiction of Court to sell infant's estate: *Craddock* v. *Piper*, 14 Sim. 310: *Greycoat Hospital* v. *Westminster Improvement Commissioners*, 1 De G. & Jo. 531, legal liability to judgments: *Cowgill* v. *Lord Oxmantown*, 3 Y. & C. 369, validity of exchange under a power: *Barclay* v. *Raine*, 1 Sim. & S. 449, whether covenant for production of deeds ran with land: *Roake* v. *Kidd*, 5 Ves. 647, destruction of contingent remainders: *Wood* v. *Beetlestone*, 1 Kay & J. 213, power of tenant for life of copyholds to bar contingent interests under 1 Will. IV. c. 47: *Nicloson* v. *Wordsworth*, 2 Sw. 365, whether release operated as a disclaimer: *Johnson* v. *Legard*, Turn. & R. 281, validity of limitations to collaterals in settlement: *Sidebottom* v. *Barrington*, 4 Beav. 110, conflicting claims of assignees in bankruptcy and insolvency: *Bristow* v. *Wood*, 1 Coll. 480, whether land bound by covenant of which purchaser had notice: *Law* v. *Urlwin*, 16 Sim. 377, merger and breach of trust: *Williams* v. *Bland*, 2 Coll. 575, sufficiency of probate in Consistorial Court to keep up representation to prerogative executor.

5. *Fact*—Titles held good on questions of:—*Maling* v. *Hill*, 1 Cox, 186, possible forfeiture of life estate by donee of power, and consequent extinguishment of power: *McQueen* v. *Farquhar*, 11 Ves. 467, suspicion of fraud insufficient: *Green* v. *Pulsford*, 2 Beav. 70, notice not followed up by proceedings: *Howarth* v. *Smith*, 6 Sim. 161, reference in codicil, raising question as to existence of another will: *Simpson* v. *Gutteridge*, 1 Madd. 609, presumed extinguishment of ancient fee-farm rents: *Hillary* v. *Waller*, 12 Ves. 239, and *Nouaille* v. *Greenwood*, Turn. & R. 26, 29, presumption of reconveyance of legal estate: *Gibson* v. *Clarke*, 1 Jac. & W. 159, and *Monck* v. *Huskisson*, 1 Sim. 280, presumption of ancient grants: *Long* v. *Collier*, 4 Russ. 267, identity of copyholds: *Major* v. *Ward*, 5 H. A. 604, identity of land in respect of which allotments are claimed: *Causton* v. *Macklew*, 2 Sim. 242, presumption of payment of old judgments: *Emery* v. *Grocock*, 6 Madd. 54, and *Townsend* v. *Champernown*, 1 Y. & J. 538, presumption of surrender of term; presumption of custom in manor: *Goold* v. *White*, Kay, 683; *Scott* v. *Nixon*, 3 Dru. & W. 388; 2 Con. & L. 185; and *Tuthill* v. *Rogers*, 1 J. & L. 36, 72, bar under statutes of limitations and *nullum tempus*: *Alexander* v. *Crosbie*, 1 J. & L. 66, nonproduction of old deeds: *Binks* v. *Lord Rokeby*, 2 Sw. 224, estate whether tithe free: *Martin* v. *Cotter*, 3 J. & L. 509, reservation of manorial rights, clearly none existing (and see *Seaman* v. *Vawdrey*, 15 Ves. 390): *Flower* v. *Hartopp*, 6 Beav. 476, right of entry which cannot be exercised: *Spencer* v. *Topham*, 22 Beav. 573, title depending on validity of a prior sale by a client to his solicitor.

6. *Fact*—Titles held bad or doubtful on questions of:—*Hartley* v. *Smith*,

Buck, 368, title depending on the unascertainable *bona fides* of the transaction (and see *Smith* v. *Death*, 5 Madd. 272) : *Lawes* v. *Lush*, 14 Ves. 547, act of bankruptcy, although no debt shown to exist: *Beale* v. *Symonds*, 16 Beav. 406, insufficiency of evidence that a party was merely a trustee: *Boswell* v. *Mendham*, 6 Madd. 373 (and see *Weir* v. *Chamley*, 1 Ir. Ch. R. 295), evidence required of fairness of transaction between father and son: *Sloper* v. *Fish*, 2 V. & B. 145, whether a deed operated as an escrow: *Stapylton* v. *Scott*, 16 Ves. 272, will suggesting a doubt of testator's title: *Grove* v. *Bastard*, 2 Ph. 619, disputed will: *Cann* v. *Cann*, 1 S. & S. 284, commission of bankrupt, before contract, against vendors, although not proceeded in: *Pierce* v. *Scott*, 1 Y. & C. 257, rotation of sale: *Townsend* v. *Champernown*, 1 Y. & J. 538, identity, whether lands parcel of manor: *Fort* v. *Clarke*, 1 Russ. 601, insufficient evidence of pedigree: *Larkin* v. *Lord Rosse*, 10 Ir. Eq. 70, and *Shackleton* v. *Sutcliffe*, 1 De G. & S. 609, liability to repairs or easements: *Webb* v. *Kirby*, 3 Sm. & G. 333, 7 De G. M. & G. 376, doubt as to whether a person on whose life the vendor's title depended was in fact alive.

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CHAPTER XIX.

AS TO REGISTRATION OF TITLE.

In the year 1862 an attempt, practically an abortive one, was made to facilitate the transfer of land and the proof of title by the establishment of a general registry, and of a mode of procedure for obtaining a judicial declaration of title. With this double object two statutes were passed in the same session of Parliament; the one, intituled "An Act to facilitate the Proof of Title to, and the Conveyance of, Real Estate," commonly known as the Land Registry Act (*a*); the other, the Declaration of Title Act, 1862 (*b*). Neither of these statutes has, to any appreciable degree, affected the law or practice of conveyancing; the latter has, in fact, hitherto remained almost a dead letter; while the former has been in effect repealed as from the 1st January, 1876, and is certainly a dead letter at the present moment.

Limits of registry;

The first part of the Land Registry Act, which was passed in 1862, under the auspices of Lord Westbury, contained the provisions as to the registration of real estates and the title thereto. The registry was confined to estates of freehold tenure, and leasehold estates in freehold lands (*c*); and application for registration of title might be made by any of the following persons, *viz*: the owner or the collective owners of the fee-simple, or who had the power of acquiring the same; persons who had the power of appointing the fee-simple; trustees for sale of the fee-simple; the owner of the

and by whom application to register might be made.

(*a*) 25 & 26 Vict. c. 53.

(*b*) 25 & 26 Vict. c. 67.

(*c*) Sect. 3; and as to leaseholds see sect. 26.

first estate of freehold and first vested estate of inheritance; any purchaser of a fee-simple, where his contract empowered him so to do, or the vendor consented, and any person authorized to do so by the Court of Chancery (*d*); and the existence of charges and incumbrances was to be no bar to the application (*e*). It has been held, that trustees having the legal estate in the land, but only a power to sell with the consent of the beneficial tenant for life, were not trustees for sale of the fee-simple within the meaning of the Act (*f*).

Registration of an indefeasible title.

The application might be either for registration of the title as indefeasible, or for registration without an indefeasible title. In the former case no title was to be accepted, unless it appeared to be such as a Court of Equity would hold to be a valid marketable one (*g*); and any doubt upon the point was to be referred to the Judge of the Court of Chancery appointed for the purpose (*h*). The application to the Court might be made *ex parte*; but in such a case, a statement in writing of the facts was to be prepared for the opinion of the Court, and certified by the Registrar (*i*).

Particulars to be furnished to Registrar.

If the title appeared to be good and marketable, the applicant was to furnish to the Registrar, for the purpose of being settled by him, an exact description of the land (*k*), and a statement of the persons interested, and of the nature of their estates, and of the incumbrances (*l*) affecting the land. Unless expressly mentioned, minerals were to be deemed as not included in the description (*m*).

(*d*) See sect. 31, where the Court of Chancery has made a declaration of title under the 25 & 26 Vict. c. 67.

(*e*) Sect. 4; and see *re Kennard*, 11 Jur. N. S. 27.

(*f*) *Bradish* v. *Allames*, 10 Jur. N. S. 251.

(*g*) Sect. 5.

(*h*) Sect. 6, and see sect. 121. The M. R. is the Judge appointed for the purpose.

(*i*) *Re Kennard*, 11 Jur. N. S. 27; *Re Drew's Estate*, L. R. 1 Ch. Ap. 126.

(*k*) The word "land" includes corporeal and incorporeal hereditaments; see interpretation clause, sect. 140.

(*l*) As to what is an incumbrance within the Act, see sects. 27 & 140.

(*m*) Sects. 7 & 9.

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Notice of intention to register.

When the Registrar had settled the description of the land, the identity of which, except in the case of incorporeal hereditaments, was to be established by the deposit of a plan, and had satisfied himself as to the title shown, he was to notify by public advertisement, his intention to register the land with an indefeasible title at the expiration of a period of not less than three months from the date of the advertisement (n); and notice was also to be served on every adjoining occupier, and the other persons mentioned in the Act (o). Subject to a right of appeal to the Judge, the Registrar had power to decide on all objections or claims which might be made against the registration (p).

Completion of registration.

If the applicant established his right, the registration was to be effected as follows:—First, the Registrar was to enter in the "Register of Estates with an indefeasible title" the description of the property, with a plan annexed, and with a number referring to the record of title; secondly he was to enter in "the Record of Title to Lands on the Registry," an exact statement of the existing estates, powers, and interests in the land, with the names and descriptions of the persons who were or might become, entitled thereto; and thirdly, he was to enter in "the Register of Mortgages and Incumbrances," under the same number, an account of all charges and incumbrances affecting the property, or the estate, or interest therein of any person named in the record of title (q). In one case, where A. and B., adjoining owners, mutually covenanted to pay their proportionate shares of the expense of keeping a private road in repair for their joint use, and the deed contained a proviso that such expenses should be a charge in Equity, and, so far as circumstances would admit, at Law also, upon the owners for the time being of the several properties, it was held, upon A. proceeding to register with an indefeasible title that this proviso did not constitute

(n) Sects. 10 & 11; and see sect. 12, as to contents of the advertisement.

(o) Sect. 12.

(p) Sect. 13.

(q) Sect. 14.

a charge which B. could require to be entered on the record of title (r). Chap. XIX.

Books to be open for inspection.

The several books of registry were to be open for inspection by owners, mortgagees, or incumbrancers whose names are entered on the record; but no other person was to have the privilege of inspection, except by order of the Court (s).

Discretionary power of the Registrar as to what might be entered on the register.

Full powers were given to the Registrar of determining the mode of entry, and any disputed question of boundary, with power to refer any question of construction, or of doubtful right or interest, to the Judge. The names of parties entitled to the proceeds of any trust for sale of registered lands, or to any principal money to be raised by virtue of any charge or term, were not to be entered in the register, unless the Registrar thought fit; but the estate of the trustees was to be defined, and the purposes of the trust shortly described (t). In one case, when A. having a registered indefeasible title, created several successive mortgages, all of which were duly entered in the register of incumbrances, a purchaser from the first mortgagee selling under his power of sale was held entitled to be registered as an owner in fee with an indefeasible title, although the second and third mortgages still appeared on the register of incumbrances (u).

When an indefeasible title arose.

Subject to any exception or condition mentioned in the record of title, and to any reserved right or registered incumbrance, the persons originally, and from time to time, named in the record of title were, for the purposes of any sale, mortgage, or contract for valuable consideration by such persons, as from the date of registration, or from such time as should be fixed by the Registrar, to be deemed indefeasibly

(r) *Re Drew's Estate*, L. R. 2 Eq. 206.

(s) Sect. 15; and see sect. 137, where, with slight variation, this provision is repeated.

(t) See sects. 16 & 19.

(u) In *re Richardson*, L. R. 12 Eq. 398 as varied, L. R. 13 Eq. 142, and see *re Winter*, L. R. 15 Eq. 156.

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entitled as against all persons, including the Crown (*x*); and no informality in the proceedings previous to the making of the entry was to be ground for setting it aside (*y*). Before final registration the applicant *and* his solicitor or agent had to state on oath that all deeds, wills, and writings relating to the title of the lands, and all facts material to the title, and all charges, contracts, and dealings affecting the property had, to the best of their belief, been made known to the Registrar (*z*); and provision was made for the security and payment of costs by the applicant (*a*).

Registration without an indefeasible title.

The Act then provided for registration without an indefeasible title by any person who could satisfy the Registrar that he, or the party through whom he claimed, had been in actual continuous undisturbed possession as owner in fee-simple, for a period of *ten* years; and the Registrar had, in the record of title, to define the time, event, or circumstance from and after which an indefeasible title was to attach; and on the happening thereof the Judge might direct the land to be transferred to "the Register of Estates with an indefeasible title" (*b*).

General provisions as to title.

Land-tax, succession-duty, tithe-rent charge, rents payable to the Crown, rights of way, and other easements, &c., leases, or agreements for leases, not exceeding twenty-one years, with actual occupation, were not to be deemed incumbrances within the meaning of the Act (*c*), though they might, if the Registrar thought fit, be noticed in the register. The land might be registered as one estate, or as separate estates (*d*), and notice of any condition, as *e. g.*, a covenant against building, was to be entered in the record of title (*e*).

Future dealings with the estate to be registered.

After registration, every estate or interest, trust, mortgage, &c., was to be entered or noticed in the record of title,

(*x*) Sect. 20.
(*y*) Sect. 21.
(*z*) Sect. 22.
(*a*) Sect. 24.
(*b*) Sect. 25.
(*c*) Sect. 27.
(*d*) Sect. 28.
(*e*) Sect. 29.

or register of incumbrances (*f*); but remained subject to the existing law, and might be assured and transmitted accordingly (*g*). The registered proprietor might, *with the consent of all persons* appearing by the register to be interested in the land, remove the same therefrom (*h*). In one case where the owner of an equity of redemption was registered with an indefeasible title subject to a mortgage, a purchaser of part of the property from the mortgagee selling under his power of sale was held entitled, after registration of his conveyance, to have the property and all entries relating to it removed from the register, without the consent of the mortgagor (*i*).

Removal from the register.

The second part of the Act is entitled, "Simplification of Title by Judicial Sales," and authorized the Court to sell land with an indefeasible title, upon the application by petition, or otherwise, as General Orders should direct, of any person empowered by the Act to apply for registration of title (*k*); and before any preliminary order was made, the application was to be served upon such persons as the Court should think fit. It had been held that the Court had no power, under the Act, to sell with an indefeasible title, except in cases where it might, without the Act, have ordered a sale (*l*). If the inquiries directed by the preliminary order proved satisfactory, the Court might make a vesting order, which, except so far as it might be qualified, conferred an indefeasible title upon the purchaser (*m*). Neither the author nor his co-editor remembers any case coming under his own observation in which the Court availed itself of these provisions of the Act.

Sales by the Court of Chancery.

The third part of the Act provided for the transfer of registered land, either by a statutory disposition in any of the scheduled forms, which were to be as effectual as any

Transfer of registered land.

(*f*) Sect. 32.
(*g*) Sect. 33.
(*h*) Sect. 34.
(*i*) *Re Winter*, L. R. 15 Eq. 156.
(*k*) Sect. 41.
(*l*) *Bradish* v. *Ellames*, 10 Jur. N.S. 251.
(*m*) See sect. 43, *et seq.*

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other form of conveyance (*n*), or by endorsement on the land certificate or by deposit of the certificate, or by any of the existing modes of assurance; but no equitable mortgage or lien on registered land was to be created by a deposit of title deeds (*o*); it might, however, be created by a deposit of the land certificate (*p*). Provision was made for rectifying and renewing the certificate (*q*), which was made evidence of the several matters stated therein (*r*); and a special certificate might be issued where the registered proprietor desired to sell or mortgage his land (*s*).

Effect of registration.

Registered land might be dealt with as if it were not registered; but no unregistered estate or interest, contract or engagement, capable of registration was to prevail against the title of a subsequent purchaser for value duly registered under the Act (*t*).

The Act also provided for registration where there had been a transmission of interest by descent, devise, or bankruptcy (*u*); and for delivering to the Registrar, for the purpose of registration, the originals or copies of all assurances of registered land, which not being testamentary were to be printed (*x*); so, also, were all memorials of matters of pedigree, and other evidence which the Registrar deemed important (*y*). No instrument was to be registered until the Registrar was satisfied that the stamp and *ad valorem* duties had been duly paid (*z*).

Caveats to be lodged with the Registrar.

In part IV. of the Act, provision was made for the lodging of *caveats* (*a*), and for the proceedings to be taken by the

(*n*) Sect. 66, and even though altered to suit the circumstances, sect. 67; but see sect. 136, where the use of the scheduled forms is made imperative.

(*o*) Sect. 63.

(*p*) Sect. 73.

(*q*) See sects. 68, 69, 118, 119.

(*r*) Sect. 71.

(*s*) Sect. 70.

(*t*) Sect. 74.

(*u*) Sects. 78—80.

(*x*) Sect. 86.

(*y*) Sect. 83.

(*z*) Sect. 88.

(*a*) Sect. 96, *et seq.*

cautioner for his protection (*b*), and for the granting of injunctions by the Court in appropriate cases (*c*). The jurisdiction of Courts of Equity on the ground of *actual* fraud was not interfered with (*d*). Any false statement, suppression, or concealment, either by principal or agent, was made a misdemeanour, and not only subjected the offender to heavy punishment, but also invalidated the act done by means of such fraud, except as against a purchaser for value without notice (*e*).

Local registries superseded.

The existing local registries in the counties of York and Middlesex were to cease to be applicable to any land situate in the said counties, so long as the same had been put on the register under the provisions of the Act, and *whilst it remained thereon* (*f*).

The Act then established an office of Land Registry under a Registrar, with assistant registrars and examiners of title, who were appointed by the Lord Chancellor (*g*).

Persons under disability.

For the purposes of the Act, a married woman entitled to her separate use, and not restrained from anticipation, was to be deemed a *feme sole*; but in other cases, her acknowledgment had to be taken under the Fines and Recoveries Act, and certified to the Court (*h*); and the Court might, if it thought fit, appoint a person to act as her next friend in any proceeding under the Act (*i*); so, also, where an infant, or lunatic, had no guardian or committee of the estate, the Court might appoint a guardian for the purposes of the Act (*k*).

Declaration of Title Act, 1862.

The sole purpose of the Declaration of Title Act, 1862 (*l*), as stated in the preamble, is to enable persons having interests in land, to obtain, in certain cases, a declaration of

(*b*) Sects. 99, 100.

(*c*) Sects. 101, 102.

(*d*) Sect. 103.

(*e*) Sect. 105; and see a similar provision in sects. 138 and 139.

(*f*) Sect. 104.

(*g*) Sect. 108, *et seq.*

(*h*) Sect. 115.

(*i*) Sect. 116.

(*k*) *Ibid.*

(*l*) 25 & 26 Vict. c. 67.

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their title, so as to enable them to make an indefeasible title to persons claiming under them as purchasers for value. The leading provisions of this statute correspond with those contained in Part II. of the Land Transfer Act, and, so far as they usefully extend or improve upon that statute, might well have been incorporated with it. The Act remained so completely a dead letter, that it seems to be unnecessary to detail its provisions (*m*).

Causes of the failure of the Land Registry Act 1862;

The causes which have prevented the Land Registry Act 1862 from achieving even a moderate measure of that success which was confidently predicted for it, might be found, not in the hostility of lawyers, but in the Act itself. In the Report of the Commissioners to whom the whole subject was referred in 1868, they are shortly summarised as follows:—First, the trouble, delay, and expense of registering titles, which far exceed those incurred on an ordinary sale, and which alone were sufficient to deter prudent purchasers from having recourse to the Act. Secondly, the fear of disputes and litigation pending the process of registering, which the service of notices upon the different persons interested in the land, and on the adjoining owners, was almost certain to occasion; thus stirring up dormant claims and questions as to easements, boundaries, &c., and giving prominence to trivial defects of title which might otherwise never be discovered. And thirdly, the prospect of having to record upon the register all subsequent dealings; thus hindering, instead of facilitating, the transfer of the land.

inherent in the Act itself.

In the judgment of the Commissioners who signed the Reports, these mischiefs were attributable, not to any shortcomings in the machinery of the office, but to radical defects in the main principle of the Act. Practically, the Act was for the registry of indefeasible titles only; for a certificate which virtually stamps a title as more or less imperfect cannot compensate for the trouble and expense of registration.

(*m*) For the only reported cases under the Act, see *re Roberts*, L. R. 10 Eq. 402; *Pritchard* v. *Roberts*, L. R. 17 Eq. 222.

In order, therefore, to obtain a certificate which would have any real value, the title must have been good and marketable, *i. e.*, a title deduced and verified, without flaw or omission, for the full period of sixty—or now forty—years; such as a Court of Equity would force upon an unwilling purchaser buying under an open contract. Few titles, however saleable under ordinary conditions, can satisfy the stringency of a rule, which the Registrar had no discretionary power to relax; and even as regards this limited class, the operation of the statute was still further impeded by the necessity which was imposed, as a condition of the acceptance of the title, that the boundaries of the registered land should be determined as against neighbouring owners, and by the delay and expense which were necessarily attendant on the working of so elaborate a system. In a word, the Act aimed at a standard of certainty and perfection of title, beyond what is ordinarily required in conveyancing transactions, and hence, as a natural consequence, instead of facilitating, it was found, in practice, to impede the transfer of land.

The Land Transfer Act, 1875, closes the registry under Act of 1862, except for re-registration;

By the Land Transfer Act, 1875 (*n*), it is enacted (*o*), that after the commencement of that Act, the date of which commencement is the 1st January, 1876 (*p*), application for the registration of an estate under the Land Registry Act of 1862 shall not be entertained; but provision is made (*q*) for the possible re-registering of estates registered under the Act of 1862.

and establishes a new registry and allows application for

By Part I. of the Land Transfer Act, 1875 (*r*), a land registry is again established in respect (*s*) to land in England and Wales of freehold tenure, or leasehold held under a lease which is either immediately or mediately derived out of land of freehold tenure: customary freeholds, where an admission or any act by the Lord of the Manor is necessary to

(*n*) 38 & 39 Vict. c. 87.
(*o*) Sect. 125.
(*p*) Sect. 3.
(*q*) Sect. 126.
(*r*) Sect. 5.
(*s*) Sect. 2.

Chap. XIX. perfect the title of a purchaser from the customary tenure, not being deemed for the purpose of the Act to be of freehold tenure.

After the commencement of the Act the following (*t*) persons (that is to say,)

registration with an absolute title, or with a possessory title only.

1. Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and
2. Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and
3. Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land, whether subject or not to incumbrances,

may apply to the Registrar under the Act to be registered, or to have registered in his stead any nominee or nominees not exceeding the "prescribed" (*u*) number, as proprietor or proprietors of such freehold land with an absolute title or with a possessory title only: provided, that in the case of land contracted to be bought, the vendor consents to the application.

Evidence of title required on application.

Where (*v*) an absolute title is required the applicant or his nominee is not to be registered as proprietor of the fee simple until and unless the title is approved by the Registrar; but where a possessory title only is required the applicant or his nominee may be registered as proprietor of the fee simple on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed.

Estate of first registered proprietor with absolute title.

The first registration (*x*) of any person as proprietor of freehold land, (in the Act referred to as first registered proprietor,) with an absolute title, is to vest in the person so registered an estate in fee simple in such land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:—

(*t*) Sect. 5.

(*u*) Which word throughout the Act means "prescribed by general rules;" see interpretation clause.

(*v*) Sect. 6.

(*x*) Sect. 7.

1. To the incumbrances, if any, entered on the register; and
2. Unless, under the provisions of the Act, the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by the Act declared not to be incumbrances; and
3. Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities, to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of first registered proprietor with possessory title.

The registration (*y*) of any person as first registered proprietor of freehold land with a possessory title only is not to affect or prejudice the enforcement of any estate, right, or interest adverse to or in derogation of the title of such first registered proprietor, and subsisting or capable of arising at the time of registration of such proprietor; but, save as aforesaid, is to have the same effect as registration of a person with an absolute title.

A qualified title may be registered in certain cases.

Where an absolute title (*z*) is required, and on the examination of the title it appears to the Registrar that the title can be established only for a limited period, or subject to certain reservations, the Registrar may, on the application of the party applying to be registered, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date, or arising under a specified instrument or otherwise particularly described in the register; and a title registered subject to such excepted estate, right, or interest is to be called a qualified title; and the registration of a person as first registered proprietor of land with a qualified title is to have the same

(*y*) Sect. 8. (*z*) Sect. 9.

effect as the registration of such person with an absolute title; save that registration with a qualified title is not to affect or prejudice the enforcement of any estate, right, or interest appearing by the register to be excepted.

Land certificate given on registration.

On the entry (*a*) of the name of the first registered proprietor of freehold land on the register, the Registrar is, if required by such proprietor, to deliver to him a certificate, in the Act called a land certificate, in the prescribed form; the certificate is to state whether the title of the proprietor therein mentioned is absolute, qualified, or possessory.

Application for registration with or without a declaration of title of lessor to grant lease.

Corresponding provisions are inserted (*b*) for the registration of leasehold land held under a lease for a life or lives, or determinable on a life or lives, or for a term of years of which more than twenty-one are unexpired; with the addition where the lease under which the land is held is derived immediately out of freehold land, and the applicant is able to submit for examination the title of the lessor, of a declaration of the title of the lessor to grant the lease under which the land is held; and in every case the lease, or if it is proved to be lost, a verified copy thereof, or of a counterpart thereof, is to be deposited with the Registrar: and land held under a lease containing an absolute prohibition against alienation, is not to be registered, or if held under a lease containing a prohibition against alienation without the license of some other person is not to be registered until and unless provision is made in the manner to be prescribed by general rules for preventing alienation without such license by entry on the register of a restriction to that effect, or otherwise.

Evidence of title required on application.

Upon an application (*c*) for the registration of leasehold land with a declaration of the title of the lessor to grant the lease the title of the lessor as well as the leasehold title is to be examined by the Registrar.

(*a*) Sect. 10. (*b*) Sect. 11. (*c*) Sect. 12.

Estate of first registered proprietor of leasehold land with a declaration of absolute title of lessor to grant lease.

The registration under the Act of any person as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held is to be deemed (*d*) to vest in such person the possession of the land comprised in the registered lease relating to such land for all the leasehold estate therein described, with all implied or expressed rights, privileges, and appurtenances, attached to such estate, but subject as follows:—

1. To all implied and express covenants, obligations, and liabilities incident to such leasehold estate; and
2. To the incumbrances (if any) entered on the register; and
3. Unless the contrary is expressed on the register, to such liabilities, rights, and interests as affect the leasehold estate and are by the Act declared not to be incumbrances in the case of registered freehold land; and
4. Where such first proprietor is not entitled for his own benefit to the land registered as between himself and any persons claiming under him, to any unregistered estates, rights, interests, or equities to which such persons may be entitled,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors.

Estate of first registered proprietor of leasehold land without a declaration of title of lessor to grant lease.

The registration of any person under the Act as first registered proprietor of leasehold land without a declaration of the title of the lessor (*e*) is not to affect or prejudice the enforcement of any estate, right, or interest affecting or in derogation of the title of the lessor to grant the lease under which the land is held; but, save as aforesaid, is to have the same effect as the registration of any person under the Act as first registered proprietor of leasehold land with a declaration that the lessor had an absolute title to grant the lease under which the land is held.

(*d*) Sect. 13. (*e*) Sect. 14.

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Lessor may be declared to have a qualified title to grant lease in certain cases.

Where an absolute title is required, and on the examination of the title of any lessor by the registrar it appears to him that the title of such lessor to grant the lease under which the land is held can be established only for a limited period or subject to certain reservations (*f*), the Registrar may, by an entry made in the register, except from the effect of registration any estate, right, or interest arising before a specified date or arising under a specified instrument, or otherwise particularly described in the register; and a title of a lessor registered subject to such excepted estate, right, or interest is in the Act referred to as a *qualified title;* and the registration of a person as first registered proprietor of leasehold land with a declaration that the lessor had a qualified title to grant the lease under which the land is held is to have the same effect as the registration of such person with a declaration that the lessor had an absolute title to grant the lease under which the land is held, save that registration with the declaration of a qualified title is not to affect or prejudice the enforcement of any right or interest appearing by the register to be excepted.

Office copy lease given on registration.

On the entry of the name of the first registered proprietor of leasehold land on the register (*g*), the Registrar is, if required by the proprietor, to deliver to him a copy of the registered lease, in the Act called an office copy, authenticated in the prescribed manner; and there is to be endorsed thereon a statement whether any declaration, absolute or qualified, as to the title of the lessor has been made, and any other particulars relating to such lease entered in the register.

Regulations as to examination of title by Registrar.

The Act then goes on to provide (*h*) that the examination by the Registrar of any title under the Act is to be conducted in the prescribed manner (*i*) provided that—

(*f*) Sect. 15.

(*g*) Sect. 16.

(*h*) Sect. 17.

(*i*) That is in such manner as shall be prescribed in general rules made in pursuance of the Act. See sects. 4 and 111.

1. Due notice be given, where the giving of such notice is prescribed, and sufficient opportunity be afforded to any person desirous of objecting to come in and state their objections to the Registrar; and that

2. The Registrar is to have jurisdiction to hear and determine any such objections, subject to an appeal to the Court in the prescribed manner and on the prescribed conditions; and that

3. If the Registrar, upon the examination of any title, is of opinion that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed, he may approve of such title, or may require the applicant to apply to the Court, upon a statement signed by the Registrar, for its sanction to the registration; and that

4. The Registrar may accept as evidence recitals, statements, and descriptions of facts, matters, and parties in deeds, instruments, or statutory declarations not less than twenty years old.

Liability of registered land to easements and certain other rights.

All registered land (*k*) is, unless under the provisions of of the Act the contrary is expressed on the register, to be deemed to be subject to such of the following liabilities rights, and interests as may be for the time being subsisting in reference thereto, and such liabilities, rights, and interests are not to be deemed incumbrances within the meaning of the Act; (that is to say,)

1. Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges having their origin in tenure; and

2. Succession duty, land tax, tithe-rentcharge, and payments in lieu of tithes, or of tithe rentcharge; and

3. Rights of common, rights of sheepwalk, rights of way, water-courses, and rights of water, and other easements; and

4. Rights to mines and minerals; and

(*k*) Sect. 18.

5. Rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals, or of property in mines or minerals; and

6. Rights of fishing and sporting, seignorial and manorial rights of all descriptions, and franchises, exerciseable over the registered lands; and

7. Leases or agreements for leases and other tenancies for any term not exceeding twenty-one years, or for any less estate, in cases where there is an occupation under such tenancies:

Provided as follows:—that

(*a*.) Where it is proved to the satisfaction of the Registrar that any land registered or about to be registered is exempt from land tax or tithe rentcharge, or from payments in lieu of tithes, or of tithe rentcharge, the Registrar may notify the fact on the register in the prescribed manner; and that

(*b*.) The Commissioners of Inland Revenue are, upon the application of the proprietor of any land registered or about to be registered upon such declaration being made, or such other evidence being produced as the commissioners require, and upon payment of the prescribed fee, to grant a certificate that at the date of the grant thereof no succession duty is owing in respect of such land, and the Registrar is in the prescribed manner to notify such fact on the register, and such notification is to be conclusive evidence of the fact so notified in respect of succession duty; and that

(*c*.) Where it is proved to the satisfaction of the Registrar that the right to any mines or minerals is vested in the proprietor of land registered or about to be registered, the Registrar may register such proprietor in the prescribed manner as proprietor of such mines and minerals as well as of the land; and that

(*d.*) Where it is proved to the satisfaction of the Registrar that the right to any mines or minerals is severed from any land registered or about to be registered, the Registrar may on the application of the person entitled to any such mines and minerals register him as proprietor of such mines and minerals in manner mentioned in the Act: and upon such registration being effected he is to enter on the register of the land a reference to the registration of such other person as proprietor of such mines and minerals.; and where the existence of any such liabilities, rights, or interests, is proved to the satisfaction of the Registrar, the Registrar may, if he think fit, enter on the register notice of such liabilities, rights, or interests in the prescribed manner.

Discharge of incumbrance.

Determination of lease.

No acquisition of title by adverse possession.

The Act then contains provisions (*l*) for notifying on the register the cessation of incumbrances, and the determination of leases affecting registered property: and provides (*m*) that a title to any land adverse to, or in derogation of, the title of the registered proprietor, is not to be acquired by any length of possession; but such provision is not to prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

Creation of charges, and delivery of certificate of charge.

The second part of the Act then provides (*n*) for the creation of charges upon registered land by entry on the register in the prescribed manner. The charge may be for payment of the principal sum either with or without interest, and with or without a power of sale. The proprietor of the charge is to have, if he so requires, a certificate of charge in the prescribed form. Subject to any entry to the contrary on the register the registered charge is

(*l*) Sects. 19 and 20. (*m*) Sect. 21. (*n*) Secs. 22—28.

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to carry with it an implied covenant to pay the principal and interest; and, if the land be leasehold, an implied covenant to pay the renewed rent and perform and observe the lessees' covenants and conditions, and to indemnify the proprietor of the charge, and his representatives, against the same.

Entry by proprietor of charge. Foreclosure. On Sale.

Subject, as aforesaid, and to the rights of prior registered incumbrancers, the registered proprietor of a registered charge may, under the charge, enter, foreclose, and, if he has a power of sale, may sell as if he were the registered proprietor of the land.

Priority and discharge of registered charges.

Subject to any entry to the contrary on the register, registered charges on the same land are as between themselves to rank according to the order in which they are entered on the register, and not according to the order in which they are created. Charges may (*o*) be transferred by appropriate entries on the register, and (*p*) on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, the Registrar is to notify on the register in the prescribed manner, by cancelling the original entry or otherwise, the cessation of the charge; and thereupon the charge shall be deemed to have ceased.

Transfer of freehold land, and delivery of land certificate.

Registered freehold land may (*q*) be transferred by the Registrar entering on the register the transferee as proprietor of the land transferred: Such transferee is, if he so requires, to have a land certificate; and in cases where part only of the land is transferred, he is, if required, to deliver to the transferor a land certificate, containing a description of the land retained by him.

Estate of transferee for valuable consideration of freehold land with absolute title.

A transfer for valuable consideration of freehold land registered with an absolute title (*r*) is, when registered, to confer on the transferee an estate in fee simple in the land transferred, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject as follows:

(*o*) Sect. 40.
(*p*) Sect. 28.
(*q*) Sect. 29.
(*r*) Sect. 30.

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1. To the incumbrances, if any, entered on the register; and

2. Unless the contrary is expressed on the register, to such liabilities, rights, and interests, if any, as are by the Act declared not to be incumbrances,

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty, her heirs and successors. A transfer for valuable consideration of freehold land registered with a qualified title (s) is, when registered, to have the same effect as a transfer for valuable consideration of the same land registered with an absolute title, save that such transfer is not to affect or prejudice the enforcement of any right or interest appearing by the register to be excepted. A transfer for valuable consideration of freehold land registered with a possessory title (t) is not to affect or prejudice the enforcement of any right or interest adverse to or in derogation of the title of the first registered proprietor, and subsisting or capable of arising at the time of the registration of such proprietor; but, save as aforesaid, is when registered to have the same effect as a transfer for valuable consideration of the same land registered with an absolute title: and a transfer of freehold land made without valuable consideration (u) is, so far as the transferee is concerned to be subject to any unregistered estates, rights, interests, or equities subject to which the transferor held the same, but, save as aforesaid, is when registered, in all respects, and in particular as respects any registered dealings on the part of the transferee, to have the same effect as a transfer of the same land for valuable consideration.

Estate of transferee for valuable consideration of freehold land with qualified title

Estate of transferee for valuable consideration of freehold land with possessory title.

Estate of voluntary transferee of freehold land.

The Act then contains (x) similar provisions in respect to the transfer of registered leasehold land. On such transfer, unless there be an entry on the register negativing such implication, there is to be implied on the part of the transferor a covenant with the transferee that, notwithstanding anything

Implied covenants on transfer of leasehold estates.

(s) Sect. 31.

(t) Sect. 32.

(u) Sect. 33.

(x) Secs. 34—38.

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by such transferor done, omitted, or knowingly suffered, the rent, covenants, and conditions reserved and contained by and in the registered lease, and on the part of the lessee to be paid, performed, and observed, have been so paid, performed, and observed up to the date of the transfer; and on the part of the transferee a covenant with the transferor, that he, the transferee, his executors, administrators, or assigns, will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the transferor, his heirs, executors, and administrators, indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent or any part thereof, or the breach of the said covenants or conditions, or any of them.

Transmission on death, bankruptcy, or marriage.

Repeal and re-enactment (with amendments) of 37 & 38 Vict. c. 78. s. 5; not to apply to registered lands.

The Act then (*y*) contains provisions for the transmission of the title to land and charges therein in the several cases of death and bankruptcy, as also on the marriage of a female registered proprietor. It also (*z*) repeals Section 5 of the Vendor and Purchaser Act, 1874, as from the commencement of the Land Transfer Act, except as to anything duly done thereunder before the commencement of that Act; and, instead thereof, it enacts, that upon the death of a bare trustee intestate as to any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment thereby substituted for the aforesaid section of "The Vendor and Purchaser Act, 1874," is not to apply to lands registered under the Land Transfer Act.

Effect of unregistered dispositions.

The third part of the Act relates to unregistered dealings with registered land: and provides (*a*) that the registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition; but, subject to

(*y*) Sect. 41—47. (*z*) Sect. 48. (*a*) Sect. 49.

the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered; and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in the Act in that behalf mentioned.

The registered proprietor alone is to be entitled to transfer a registered charge by a registered disposition; but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land.

Registration of notice of lease.

The Act then provides (*b*) for the registration of notice of leases or agreements for a lease of registered land made subsequently to the last transfer of the land on the register, where the term granted is for a life or lives, or is determinable on a life or lives, or exceeds twenty-one years, or where the occupation is not in accordance with such lease or agreement, and for registering estates in dower or by the curtesy in registered land, and contains requisite provisions (*c*) for entering cautions against dealings with such land or charge, on the part of the registered proprietor, until notice has been served upon the cautioner; and for issuing orders or making (*d*) entries inhibiting for a time, or until the occurrence of an event to be named in such orders or entries or generally until further order or entry, any dealing with any registered land or registered charge.

Estates in dower or by the curtesy.

Unregistered dealings with unregistered land.

Caution and inhibitions against registered dealings.

(*b*) Secs. 50—52. (*c*) Secs. 53—56. (*d*) Sect. 57.

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Power to place restrictions on register.

An entry may also be made at the instance of (*e*) the registered proprietor of land, that no transfer shall be made of or charge created on such land, unless the following things, or such of them as the proprietor may determine, are done; (that is to say,)

Unless notice of any application for a transfer or for the creation of a charge is transmitted by post to such address as he may specify to the registrar:

Unless the consent of some person or persons, to be named by such proprietor, is given to the transfer or the creation of a charge:

Unless some such other matter or thing is done as may be required by the applicant and approved by the registrar.

Caution.

As to registration of crown lands.

Of land below high water mark.

Of lands of different tenures.

The fourth part of the Act contains provisions supplemental to the foregoing parts of the Act: viz., in respect to cautions (*f*); the registration (*g*) of crown lands and lands belonging to the duchy of Lancaster, or otherwise vested in any public officer or body in trust for the public service, or belonging to the duchy of Cornwall; and (*h*) as to the registration of any land below high-water mark at ordinary spring tides; and (*i*) as to the registration of land of freehold tenure and also land of a tenure other than freehold, intermixed and undistinguishable.

Trustees may sell by medium of registry.

It also (*k*) enacts that any person holding land on trust for sale, and any trustee, mortgagee, or other person having a power of selling land, may authorize the purchaser to make an application to be registered as first proprietor with any title which a proprietor is authorized to be registered with under the Act, and may consent to the performance of the contract being conditional on his being so registered, or may himself apply to be registered as such proprietor with the consent of the persons (if any) whose consent is required

(*e*) Secs. 58—59.
(*f*) Secs. 60—64.
(*g*) Sect. 65.
(*h*) Sect. 66.
(*i*) Sect. 67.
(*k*) Sect. 68.

to the exercise by the applicant of his trust or power of sale; and the amount of all costs, charges, and expenses properly incurred by such person in or about such application is in all cases to be ascertained and declared by the Registrar, and to be deemed to be costs, charges, and expenses properly incurred by such person in the execution of his trust or in pursuance of his power; and such person may retain or reimburse the same to himself out of any money coming to him under the trust or power, and he is not to be liable to any account in Equity in respect thereof. It also provides (*l*) for the registration on the application of any two or more persons entitled for their own benefit, concurrently or successively, or partly in one mode and partly in another, to such estates, rights or interests in land as together make up such an estate as would, if vested in one person, entitle him to be registered as proprietor of the land. It also (*m*) enacts that before the completion of the registration of any land in respect of which an examination of title is required, the vendor and his solicitor, in cases where the applicant is a person who has contracted to buy such land, and in all other cases the applicant for registration and his solicitor is, each, if required by the registrar, to make an affidavit or declaration that to the best of his knowledge and belief all deeds, wills, and instruments of title, and all charges and incumbrances affecting the title to the land which is the subject of the application, and all facts material to such title, have been disclosed in the course of the investigation of title made by the Registrar: and the Registrar may require any person making such affidavit or declaration to state therein what means he has had of becoming acquainted with the several matters referred to in this section; and if the Registrar is of opinion that any further or other evidence is necessary or desirable, he may refuse to complete the registration until such further or other evidence is produced.

Registration of part owners.

Instruments and facts affecting the title to be disclosed on registrations.

It also empowers (*n*) the registrar to enforce production of any deeds, instruments, or evidences of title relating to or

Production of deeds.

(*l*) Sect. 69. (*m*) Sect. 70. (*n*) Sect. 71.

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Costs of application for registry.

affecting the land, to the production of which the applicant, or any trustee for him is entitled, and states (o) how the costs, charges, and expenses if incurred by any proceedings for registration of land are, unless the parties otherwise agree, to be taxed and paid.

Registrar may state case for court of law or direct issue.

Whenever (s. 74) upon the examination of the title to any land the registrar entertains a doubt as to any matter of law or fact arising upon such title, he may, upon the application of any party interested in such land, refer a case for the opinion of any of Her Majesty's superior courts, with power for the court to direct an issue to be tried before any jury for the purpose of determining any fact; the registrar may also name the parties to such case, and the manner in which the proceedings in relation thereto are to be brought before the court to which such case is referred.

Opinion of court or decision of jury, how far conclusive.

In case of incapacitated persons.

The opinion (s. 75) of any court to whom any case is referred by the registrar is to be conclusive on all the parties to such case, unless the court before whom such case is heard permits an appeal to be had; and there are provisions (ss. 76 and 77) for binding either absolutely, or only to any specified extent, the interests of persons unascertained or not *sui juris*.

The Act then (ss. 78, 79, 80, and 81) provides for cases where any land certificate or office copy of a registered lease or certificate of charge is lost, mislaid, or destroyed, and makes these documents *primâ facie* evidence of the several matters therein contained; and their deposit equivalent to a deposit of the title deeds of the land.

Registry of advowsons and other special hereditaments.

It then (s. 82) authorizes the registration of any advowson, rent, tithes impropriate, or other incorporeal hereditament of freehold tenure, enjoyed in gross, and of any mines or minerals where the same have been severed from the land, and of any fee farm grant, or other grant, reserving

(o) Sect. 73.

rents or services to which the fee simple estate in any freehold land about to be registered or registered [*Qu.* re-registered] may be subject. Chap. XIX.

The Act then provides (s. 83), among other matters, that there shall not be entered on the register or be receivable by the registrar, any notice of any trust, implied, express, or constructive; that no person shall be registered as proprietor of any undivided share in any land or charge, and that a number of persons exceeding the prescribed number shall not be registered as proprietors of the same land or charge: where land is registered in the names of husband and wife as co-proprietors, no registered disposition of such land is to take place until the wife, if alive, has been examined in the prescribed manner and has assented to such disposition after full explanation of her rights in the land and of the effect of the proposed disposition; and—a very important provision, and in which the present Act differs from its predecessors—that registered land shall be described in such manner as the registrar thinks best calculated to secure accuracy, but that such description is not to be conclusive as *to the boundaries or extent* of the registered land. No trusts recognized, &c.

It also enables (s. 84) a proprietor to register his land either in the first instance, or on a subsequent transfer thereof to a purchaser for valuable consideration, subject to a condition that such land or any specified portion thereof is not to be built on, or is to be or not to be used in a particular manner, or any other condition running with or capable of being legally annexed to land. Annexation of conditions to registered land.

All the provisions (s. 85) of the Trustee Act, 1850, and of any amending Act, are to apply to land and charges registered under the Land Transfer Act, but this enactment is not to prejudice the applicability to such land and charges of any provisions of such Acts relating to land or choses in action. Registered lands to be within the Trustee Act, 1850.

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Provision as to married women.

The Act then contains provisions (ss. 87 and 88) for the separate examination of married women, other than those entitled for their separate use and not restrained from anticipation, and for the appointment of guardians for infants and lunatics; and (s. 89, *et seq.*) as to notices; and provides (s. 92) that a purchaser for valuable consideration shall not be affected by the omission to send any notice by the Act directed to be given, or by the non-receipt thereof.

Power of court in suit for specific performance.

Establishment of adverse title to land.

The Act (s. 93, *et seq.*) then enables the Court having cognizance of any suit instituted for the specific performance of a contract relating to registered land, or a registered charge, to compel the appearance and bind the interests of parties who have registered estates or rights in such land or charge, or have entered up notices, cautions, or inhibitions against the same; and provides (s. 95) for the rectification of the register when such rectification is required in consequence of any court of competent jurisdiction having decided that any person is entitled to any estate, right, or interest in or to any registered land or charge: but it contains no provision for the removal of registered land from the register.

Certain fraudulent acts declared to be misdemeanours. False declarations.

The Act then, as regards fraud (s. 98, *et seq.*) provides that, subject to the provisions therein contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner; and it declares the fraudulent suppression of documents or facts, and other fraudulent acts therein referred to, and the making of false declarations and affidavits, to be misdemeanours, punishable by fine and imprisonment; but without prejudice to the civil remedy of the aggrieved party; and with a saving of the obligation to make discovery in civil proceedings.

Part V. of the Act (s. 106) constitutes a new office* in London to be called the Office of Land Registry, the business of which is to be conducted by a registrar, assistant

registrars, and inferior officers; whose duties are to be subject to regulations to be promulgated by the Lord Chancellor. The general conduct of the business of registration is to be under the control of the registrar (s. 108); who is empowered to summon witnesses, and compel the production of documents, and to impose a fine in case of non compliance (ss. 109, 110).

Power of Lord Chancellor to make general rules.

It empowers (s. 111) the Lord Chancellor, with the advice and assistance of the registrar, from time to time to make, and when made to rescind, annul, or add to, general rules in respect of all or any of the various matters therein specified, and any other matter or thing in respect of which it may be expedient to make rules for the purpose of carrying the Act into execution; and such rules are to be of the same force as if enacted in the Act.

Principles on which fees determined.

It then (s. 112) empowers the Lord Chancellor, with the concurrence of the Commissioners of the Treasury, to make, and when made revoke, alter, or add to, rules with respect to the amount of fees payable under the Act, regard being had to the following matters:—(1) In the case of the registration of land, or of any transfer of land on the occasion of a sale,—to the value of the land as determined by the amount of purchase money; and (2) in the case of the registration of land, or of any transfer of land not upon a sale,—to the value of the land, to be ascertained in such manner as may be prescribed; and (3) in the case of registration of a charge or of any transfer of a charge—to the amount of such charge; and lays down rules which are to be observed with respect to the fees payable in pursuance of the Act.

Mode of taking fees.

Description and the powers of the court.

It then (s. 114, *et seq.*) provides that for the purposes of the Act, "the court" shall mean the Court of Chancery or the county court, according as the one or other of such courts may be prescribed by the general rules made for carrying into effect the Act: it gives the county court, in

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cases where it has jurisdiction under the Act, all the powers of the Court of Chancery, exercisable either in open court or in chambers; it empowers the Lord Chancellor to assign the duties vested in the Court of Chancery in relation to matters under the Act to any particular judge or judges of that court; and gives right of appeal from any order of a judge of a county court to the Court of Chancery; and from any order made under the Act by the Court of Chancery otherwise than on appeal from a county court, in the manner and with the incidents in and with which orders made by the Court of Chancery on cases within the ordinary jurisdiction of such court may be appealed from.

Power to form district registries by general orders.

The Act then (s. 118) empowers the Lord Chancellor, with the concurrence of the Commissioners of Her Majesty's Treasury, to have power by general orders to create district registries for the purposes of registration of land within the defined districts respectively, and to alter such districts, and to give and make consequential directions and appointments; and contains (s. 123, *et seq.*) provisions with reference to the staff of the existing Land Registry Office to the new office, and for the possible re-registry under the Act of estates already registered under the Act of 1862; it provides (s. 127) for the exemption of land once registered under the Act from the operation of the Middlesex and other local registry Acts; and by s. 129, which may be considered to be not the least useful clause of the statute, it repeals the seventh section of the Vendor and Purchaser Act, 1874, as from the date at which that Act came into operation, except as to anything duly done thereunder before the commencement of the Land Transfer Act.

Repeal of the 7th section of V. & P. Act, 1874.

Such are the main provisions of an Act which will probably achieve a success greater than that achieved by its predecessors; but less than that which would be commensurate with the ability and labour with which it has been framed.

CHAPTER XX.

AS TO THE POWER OF THE COURT TO SELL UNDER RECENT STATUTES.

1. *The Leases and Sales of Settled Estates Act.*
2. *The Confirmation of Sales Act.*
3. *The Partition Act*, 1868.

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The Leases and Sales of Settled Estates Act.

(1.) It remains to consider how far the ordinary relative rights and liabilities of vendor and purchaser are varied or affected by the circumstance of the sale being made under the decree of the Court of Chancery; but before doing so, it will be convenient to notice here several modern statutes, by which the jurisdiction of the Court to order a sale of real estate has been greatly enlarged.

Court may authorize sales of settled estates;

By the 11th section of the "Leases and Sales of Settled Estates Act" (*a*), the Court is empowered, so far as relates to estates in England, "if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the Act contained, from time to time to authorize a sale of the whole or any parts of any settled estates, or of any timber (not being ornamental timber) growing thereon." Where the land is sold for building purposes, a fee-farm rent may be reserved as the consideration (*b*); and minerals may be excepted and the right of working them may be reserved, the purchaser of the land being liable to enter into any covenant, or to submit to any

and may reserve minerals;

(*a*) 19 & 20 Vict. c. 120; and see the Amendment Acts, 21 & 22 Vict. c. 77; and 27 & 28 Vict. c. 45.

(*b*) Sect. 12.

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restrictions which the Court may deem advisable (*c*). It has been held that a sale of minerals apart from the surface may be made under these sections (*d*); and in such a case a rent-charge may, it seems, be reserved in respect of the surface from time to time damaged by the workings (*e*).

and authorize dedication of part of settled estate for roads.

The Court may, on any sale under the Act, direct that any part of the settled estates shall be laid out for streets, roads, paths, squares, gardens, sewers, &c., either to be dedicated to the public or not; and may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to other trustees for securing the continued appropriation thereof (*f*). Unless the roads are beneficial to the property in its existing condition, or there is an intention of immediately using it for building purposes, the Court will not make any order under this section (*g*); nor will it sanction the sale of part of the estate in order that the proceeds may be applied in laying out roads over other portions, and in thus rendering them available for building purposes (*h*); but it will authorize building leases on the terms of the lessees making the roads (*i*).

What is a "settlement" and a "settled estate" within the Act.

For the purposes of the Act, the word "settlement" signifies any Act of Parliament, deed, &c., will, or other instrument, or any number of such instruments, under which any hereditaments of whatever tenure, or any estates or interests therein, stand limited to, or in trust for, any

(*c*) Sect. 13.

(*d*) *Re Law*, 7 Jur. N. S. 511; *Re Mallin*, 3 Giff, 126. Until the 25 & 26 Vict. c. 108 (*vide infrà*) this could not be effected under an ordinary power of sale.

(*e*) *Re Milward's Estate*, L. R. 6 Eq. 248.

(*f*) Sect. 14; and see sect. 15 as to how the conveyance is to be executed.

(*g*) *Re Hurle's Settled Estates*, 2 H. & M. 196.

(*h*) *Re Chambers' Settled Estates*, 28 Beav. 653; *Re Hurle's Settled Estates*, *ubi suprà*.

(*i*) *Re Chambers' Settled Estates*, *ubi suprà*. And as to the power of the Court to authorize leases of settled estates, see sects. 2—10; and sects. 2—5 of the 21 & 22 Vict. c. 77. A lease granted under the Act need not now be settled in Chambers; see 27 & 28 Vict. c. 45, s. 1; and for cases under these provisions, see Morgan, 239, *et seq.*

persons, by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates" is defined as "all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement" (k): and in determining what are "settled estates" within the Act, the Court, under a later enactment, is to be governed by the state of facts, and by the trusts or limitations of the settlement, at the time of the said settlement taking effect (l). Where an estate was devised to A. for life, with remainder to A.'s children equally at twenty-one, and some of the children had attained twenty-two (two of them having resettled their shares), and the others were still infants, it was held, after the death of A., that this was a settled estate within the meaning of the Act; and, on the parties absolutely entitled joining in the petition, a sale was directed (m); and it was also held that a clause of survivorship and accruer contained in the will was a limitation "by way of succession" (n); but this was considered doubtful by the Lords Justices in a previous case (o). The fact of the settlement containing a trust for sale, and of the trusts being declared merely of the sale proceeds, does not prevent the estate being considered as "settled" within the meaning of the Act (p).

Order for sale, how obtained and by whom.

An order for the sale of a settled estate may be obtained

(k) See sect. 1; and see 21 & 22 Vict. c. 77, s. 1, which extends the meaning of the word "settlement" and "settled estates" so as to include estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator.

(l) See 27 & 28 Vict. c. 45, s. 3. And see, before the Amendment Act, *Re Goodwin's Settled Estates*, 3 Giff. 620; 8 Jur. N. S. 1170, where the state of facts existing at the date of the settlement was considered to be the test. See too, *Re Birtle's Settled Estates*, 11 W. R. 730. But see *Re Burdin's Will*, 5 Jur. N. S. 1378.

(m) *Re Goodwin's Settled Estates ubi suprà.*

(n) *Ibid.*

(o) *Re Burdin's Will*, 5 Jur. N. S. 1378; but see *Re Clark*, L. R. 1 Ch. Ap. 292; and see and consider *Re Shepheard's Settled Estate*, L. R. 8 Eq. 571, in which case the fact of the estate not being limited by way of succession appears to have been overlooked.

(p) See *Re Greene*, 10 Jur. N. S. 1098; *Re Laing's Settled Estates*, L. R. 1 Eq. 416; *Collett* v. *Collett*, L. R. 2 Eq. 203.

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upon the application by petition of any person entitled to the possession or to the receipt of the rents and profits for a term of years determinable on his death, or for an estate for life (which has been held to include an estate *durante viduitate* (q), or any greater estate (r): but where there is a tenant in tail under the settlement in existence and of full age, such tenant in tail, or if there is more than one, then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under the settlement prior to such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail, must, subject to the qualification mentioned below, either concur in, or consent to, the application: and, in every other case, there must, as a general rule, be either the concurrence or consent of all persons in existence having any beneficial estate or interest under the settlement, and of all trustees having any estate or interest on behalf of any unborn child (s). The Court may, however, dispense with such concurrence or consent; in which case the order, unless made under the extended powers of the 37 & 38 Vict. c. 33, which we shall presently notice, will be made without prejudice to the rights and interests of non-consenting parties (t); and notice of any application under the Act is to be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is required by the Act, and on any other parties who, in the opinion of the Court, ought to be so served, unless the Court shall think fit to dispense with such notice (u). It has been held under these sections, that although trustees, without any power of sale, can only consent on behalf of unborn children, yet if they have such a power, and concur in the application, their *cestuis que trust* will be bound (x); so also if they are competent

(q) *Williams* v. *Williams*, 9. W. R. 828; where, however, the parties entitled in remainder joined.

(r) Sect. 16.

(s) Sect. 17.

(t) Sect. 18.

(u) Sect. 19.

(x) *Grey* v. *Jenkins*, 26 Beav. 351; *Re Potts*, 15 W. R. 29.

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to receive and give a valid discharge for the purchase-money (*y*). As a general rule, however, all the parties beneficially interested—including, it has been held, even persons claiming under the trusts of a term for raising portions (*z*)—must concur in the application (*a*); and should any of them, except perhaps from mere caprice, refuse to do so, no order will be made (*b*); but the Court, it seems, has no power to appoint a guardian to consent on behalf of a person of unsound mind, not so found by inquisition (*c*).

Concurrence of necessary parties when dispensed with.

The Court, however, has under the principal Act dispensed with the concurrence of a lunatic, not found so by inquisition, where he had a present right to a definite annual charge out of the estate (*d*); so, also, with the concurrence of a married woman, whose interest was remote and protected by trustees (*e*). In one case, where there was no tenant in tail in existence of full age, and there were numerous pecuniary legatees, an order was made subject to, and so as not to affect, their rights and interests under the will (*f*). As a general rule, a copy of the petition, and not merely a notice of the intended application, is served on all parties whose consent or concurrence is required, without taking the directions of the Court upon the subject (*g*).

Power to dispense with consents under the recent Act.

The power of the Court to dispense with the concurrence or consent of parties interested, and to proceed in their absence, has been enlarged by the 37 & 38 Vict. c. 33, which provides that where under the principal Act, the concurrence or consent of any person in or to any future

(*y*) *Eyre* v. *Saunders*, 4 Jur. N. S. 830.

(*z*) *Re Boughton*, 12 W. R. 34.

(*a*) *Grey* v. *Jenkins*, *ubi suprà*.

(*b*) See *Re Hurle's Settled Estates*, 2 H. & M. 196, 202: *Re Hutchinson*, 14 W. R. 473; *Re Merry's Estate*, 15 W. R. 307.

(*c*) *Re Clough's Estate*, L. R. 15 Eq. 284; and see *contrà Re Venner's Estate*, L. R. 6 Eq. 249, where the order appears to have been made *per incuriam*.

(*d*) *Re Turbutt's Estate*, 2 N. R. 158.

(*e*) *Re Lord de Tabley's Settled Estates*, 11 W. R. 936.

(*f*) *Re Parry's Will*, 34 Beav. 462, where a lease was ordered to be granted; and see *Re Legge's Settled Estates*, 4 W. R. 20.

(*g*) See Dan. Ch. Pr. p. 1804.

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application is required and shall not have been obtained, notice is to be given to him in such manner as the Court shall direct, requiring him to notify within a time to be specified in the notice whether he assents to or dissents from the application, or submits his rights and interests to be dealt with by the Court; and if he fail to do so, he is to be deemed to have made such submission (*h*). Under this provision the Court has directed notice of an intended application to be served on a person of unsound mind, not so found by inquisition (*i*). And an order under the principal Act may now be made, notwithstanding that the concurrence or consent of any person whose concurrence or consent is required has not been obtained or has been refused: but the Court in dealing with the application is to have regard to the number of the parties who concur in or consent to it, and who dissent from it, or submit their rights and interests to be dealt with by the Court (*k*).

Mode of procedure under the Acts.

In simple cases, the mode of proceeding under the Acts is shortly as follows:—After the petition has been presented, the direction of the Judge is obtained, *ex parte* in chambers, as to what notices of the application are to be advertised (*l*). Especial care must be taken in framing the advertisement (which is not, as in other cases, settled by the chief clerk) that the heading of the notice corresponds exactly with the title of the petition, setting out the name, address, and description of the petitioner, and a place of service as required by the General Orders (*m*). A trifling irregularity has in one or two cases been overlooked (*n*); but, as a general rule, if there has been any want of strict compliance with the General Orders, the notices must be reissued (*o*).

(*h*) Sect. 2.

(*i*) *Re Crabtree's Settled Estates*, L. R. 10 Ch. Ap. 201.

(*k*) Sect 3.

(*l*) The *London Gazette* and two local papers are generally selected, and the advertisement is inserted once in each for three successive weeks; See *Browne* v. *Pennefather*, 4 N. R. 221.

(*m*) Cons. Ord. XLI. r. 14.

(*n*) *Re Burley's Estate*, V.-C. S., 25 May, 1868; *Re Nune's Estate*, V.-C. M., 15 March, 1867. See too *Re Whiteley's Settled Estates*, L. R. 8 Eq. 574, where the omission was serious.

(*o*) *Re Bateman's Settled Estates*, 13 W. R. 513, L. J. J.

So also if, after advertisement, the petition is amended by the introduction of new facts, or fresh parties, so as to be, in substance, a different application (*p*). The petition is not to be set down for hearing until after the expiration of three weeks from the publication of the last of the advertisements (*q*); and this rule is most stringently observed (*r*). Any motion for leave to be heard on the petition should be made *ex parte*, within seven clear days after the publication of the advertisement which may be last inserted in the newspaper, but not later, except by special leave of the Court; and the order made on the motion is to be served on the petitioner within four days after the making thereof (*s*).

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What evidence is required.

On the hearing of the petition, the Court requires satisfactory proof as to there having been no previous application to Parliament which has been rejected or reported against (*t*); and also as to the parties interested in the estate whose consent is necessary under the Act, and the circumstances which render the proposed sale proper and expedient (*u*). Occasionally, the petition is adjourned into chambers for further examination of the evidence; but, as a general rule, the order is made in Court at the hearing. Notice of the order must be endorsed on the settlement, or otherwise recorded as the Court directs (*x*); and the order must itself specify the document or documents on which the notice is to be endorsed (*y*). The proceedings on a sale under the order are the same as under a decree in a suit (*z*).

Application of sale moneys.

All money received on any sale effected under the authority of the Act may, if the Court shall think fit, be paid to any trustees of whom it shall approve, or into Court to the

(*p*) *Re Bunbury*, 11 Jur. N. S. 27, L. C.

(*q*) Cons. Ord. XLI. r. 20.

(*r*) *Re Mallin's Settled Estates*, 3 Gif. 126; *Re Blake's Settled Estates*, W. R. 539; but see *Re Adam*, 6 L. T. N. S. 604.

(*s*) See Cons. Ord. XLI. r. 17; *Re Merry's Settled Estates*, 14 W. R. 665.

(*t*) See sect. 21.

(*u*) Cons. Ord. XLI. r. 22; and for form of affidavit, see Dan. Ch. Forms.

(*x*) See sect. 22.

(*y*) Cons. Ord. XLI. r. 24.

(*z*) As to which *vide infrà*, Ch. XXI.

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credit of the applicant in the matter of the Act; and, in either case, is to be applied in the purchase or redemption of the land-tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments, subject to the same uses or trusts; or in the purchase of other hereditaments to be settled in the same manner as the hereditaments, in respect of which the money was paid; or in the payment to any person becoming absolutely entitled (*a*); and it would seem that in a proper case the Court will sanction the money being applied in the erection of new buildings on the settled property (*b*); but not, it would seem, in reinstating buildings which have been destroyed, or in repairs or permanent improvements not involving the erection of new buildings (*c*). Until the money can be applied to any one of such purposes, it is to be invested in Exchequer Bills or Consols, the interest and dividends of which are to be paid to the person who would have been entitled to the rents and profits of the land, if the money had been invested in the purchase of land (*d*). Trustees, to whom the money is ordered to be paid, may apply it as directed by the Act, without the necessity of any application to the Court (*e*). And if there are no existing trustees, the Court will, it seems, appoint new trustees for the purposes of the Act (*f*). In one case where lands which were settled for the separate use of a married woman for her life without power of anticipation, and after her death upon trust for sale, were sold during her lifetime under the Act, the proceeds of sale were ordered to be paid

(*a*) Sect. 23.

(*b*) *Re Newman's Settled Estates*, L. R. 9 Ch. Ap. 681; following the analogous provisions in the L. C. C. Act, 8 Vict. c. 18, s. 69, *suprà*, p. 664; and see *Drake* v. *Trefusis*, L. R. 10 Ch. Ap. 364.

(*c*) *Drake* v. *Trefusis*, *ubi suprà*.

(*d*) Sect. 25, and see *Re Shaw's Settled Estates*, L. R. 14 Eq. 9, where Lord Romilly, M. R., overruling *Re Cook's Settled Estates*, L. R. 12 Eq. 12, held that the Court has no power to direct an interim investment of the sale moneys in any of the other funds and securities in which cash under the control of the Court may be invested. But see *Re Thorold's Settled Estates*, L. R. 14 Eq. 31, where V.-C. Malins refused to follow Lord Romilly's decision.

(*e*) Sect. 24.

(*f*) *Re Sexton Barn's Settled Estates*, 10 W. R. 416.

to the trustees of the settlement, to be held upon the trusts thereby declared of purchase-money (*g*): and, in another case, the Court, on the petition of the tenant for life, with the consent of the remainderman, ordered part of the money to be invested on mortgage security, although not strictly an investment authorized by the Act (*h*).

When, as is usually the case, the estate of a tenant for life is without impeachment of waste, the Court might advantageously be more particular than it commonly is, in inquiring what will be the effect of the sale and reinvestment upon the relative rights of tenant for life and remaindermen. A sale of a settled estate without timber or minerals, and a subsequent purchase of a mineral or timber estate, may obviously be a source of great and improper benefit to the tenant for life.

The Act is retrospective.

The Act extends to settlements made before it came into operation (*i*); and the Court may exercise the powers conferred upon it repeatedly in respect of the same property, notwithstanding that the settlement contains similar powers (*k*): but the Act has no operation where its interference is either expressly, or by implication, negatived by the settlement (*l*). The Court has full jurisdiction as to costs, which may be charged upon the hereditaments which are the subject of the application, or upon any other hereditaments held under similar limitations, and may be ordered to be raised and paid by sale or mortgage, or out of rents and profits.

Purchaser acquires an indefeasible title *semble*.

A sale, purporting to be in pursuance of the Act, is not to be invalidated, after completion, on the ground that the Court was not authorized to make it; but it has no effect as against any person whose consent or concurrence was

(*g*) *Re Morgan's Settled Estates*, L. R. 9 Eq. 587; *sed quære*.

(*h*) *Wall* v. *Hall*, 11 W. R. 298.

(*i*) Sect. 44.

(*k*) See *Re Thompson's Settled Estates*, Johns. 423; *Grey* v. *Jenkins*, 26 Beav. 351.

(*l*) Sect. 26.

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necessary, and has not been obtained (*m*); unless, it is conceived, the Court has dispensed with such consent or concurrence under the provisions of the recent statute (*n*). Subject to this qualification, it would seem that a purchaser, having obtained his conveyance, has an unimpeachable title, notwithstanding formal irregularities, or an excess in the exercise of the jurisdiction (*o*): but this section does not preclude him from raising the objection that the Court, in making the order, is exceeding its statutory powers (*p*).

Mode of procedure where any of the parties are under disability.

From the short sketch given above of the mode of procedure under the Act, it will be obvious that, even in a simple case, it is not always an easy matter to obtain an order for the sale of a settled estate: but the difficulties and expense are greatly increased where, as must nearly always happen, some of the parties interested, whose concurrence or consent is necessary, are under disability. In the case of infants, lunatics, and bankrupts or insolvents, the powers conferred by the Act, and the applications under it, and the requisite consents, may be exercised, made, or given by their guardians, committees, or assignees, as the case may be: but in the case of an infant, or lunatic tenant in tail, no such application is to be made, or consent given, by any guardian or committee, without the special direction of the Court (*q*). It has been held, contrary to what was the previous established practice (*r*), that a testamentary guardian of an infant is not a guardian within the meaning of this section (*s*); nor is the infant's father, although he has no adverse interest (*t*); so that in every such case a guardian must be specially appointed by the Court. In order to obtain such appointment, a summons must be taken out *ex parte* at the chambers of the judge to whom the application

(*m*) Sect. 23.

(*n*) 37 & 38 Vict. c. 33; and *vide suprà*, p. 1175.

(*o*) See *Re Thompson's Settled Estates*, Johns. 418, 423; and see *Re Woodcock's Trusts*, L. R. 3 Ch. Ap. 230.

(*p*) *Ibid.*

(*q*) Sect. 36.

(*r*) Dan. Ch. Pr. 1811.

(*s*) *Re Robert James*, decd., L. R. 5 Eq. 334.

(*t*) *Re Caddick*, 7 W. R. 334.

has been, or is intended to be, made (*u*); and the Court, by its regulations (*x*) (which, though not absolutely binding as orders, are seldom dispensed with (*y*)), requires very strict evidence as to the age and circumstances of the infant, and the nature of the proposed application. If the infant is a tenant in tail, the guardian, when appointed, must, on a summons taken out for the purpose and supported by evidence that the proposed application is under the circumstances a proper one, and for the benefit of the infant, obtain the sanction of the Court before he can make or consent to the application (*z*), and this regulation applies equally to the committee of a lunatic tenant in tail. Where the application to the Court is made on behalf of the infant, the appointment of a guardian should precede, but where a consent only is needed, may either precede or follow, the presentation of the petition (*a*). In a recent case, where a person, whose consent was necessary, was a lunatic, it was held that this consent could not be given by the committee without the sanction of the jurisdiction in lunacy (*b*). The Act, it will be observed, does not expressly provide for the case of a person of unsound mind not so found by inquisition: but it has been recently held that only a committee duly appointed can give the requisite consent, and that the Court has no power to appoint a guardian for the purpose (*c*). A married woman, whether of full age or an infant, is competent to make, or consent to, any application under the Act (*d*): but she must be first separately examined, either by the Court, or by some solicitor duly

(*u*) See Cons. Ord. XLI. r. 23; and for forms of summons and affidavit in support, see Dan. Ch. Forms, 1957, *et seq.*

(*x*) See Regulations of 8 Aug., 1857, Morgan App. lvi., lvii.

(*y*) *Re Longstaffe's Settled Estates*, 1 Dr. & Sm. 142; and see *Re Hargreaves*, 5 Jur. N. S. 60.

(*z*) In practice, the appointment of a guardian and the authority to make or consent to the application are generally combined in the same summons. See Dan. Ch. Pr. 1812.

(*a*) See as to dispensing with this regulation, *Re Longstaffe's Settled Estates*, *ubi suprà*.

(*b*) *Re Woodcock's Trusts*, L. R. 3 Ch. App. 229.

(*c*) *Re Clough's Estates*, L. R. 15 Eq. 284; in effect overruling *Re Venner's Settled Estates*, L. R. 6 Eq. 249, where the order was made *ex parte;* and see *Re Crabtree's Settled Estates*, L. R. 10 Ch. Ap. 201.

(*d*) Sect 39.

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appointed for the purpose, as to her knowledge of, and free consent to, the application (*e*); and the existence in the settlement of a clause restraining anticipation is not to prevent an exercise of the powers conferred by the Act, or to work a forfeiture (*f*). A married woman *petitioning* should be examined before any judicial step is taken: but if she is merely a *consenting* party, she may be examined at any time after the petition is presented but before it is heard (*g*). In one case, where her interest was remote, and sufficiently represented by trustees, her separate examination was dispensed with (*h*).

General remarks on the Act.

The provisions of this Act have been largely resorted to, and have proved extremely beneficial in numerous cases where, from the want of an adequate trust or power in the settlement, the opportunity of effecting an advantageous sale would otherwise have been, perhaps irretrievably, lost: but their practical utility has been greatly impaired by the stringent statutory requirements as to notices, consents, &c., and by the cumbrous machinery which has been provided for the exercise of the jurisdiction. The interests of beneficiaries, and considerations of public convenience, alike demand that a settled estate should be readily susceptible of alienation, whenever, under altered circumstances, or for any other cause, its immediate conversion into money is more advantageous to the *cestuis que trust* than its retention *in specie*. The principle of the statute has already been usefully extended by the Partition Act, 1868 (*i*), under which, wherever a bill for partition will lie, a sale may be expeditiously, and at a trifling expense, effected, notwithstanding the dissent of some of the parties interested; and there seems to be no sufficient reason why there should not

(*e*) Sects. 37 and 38. The solicitor acting in the matter should not be appointed, see *Brealey's Settled Estates*, 5 W. R. 613; and as to the mode of taking the examination, see *Re Bendyshe*, 3 Jur. N. S. 727; and where the *feme covert* is resident abroad, see now 21 & 22 Vict. c. 77, s. 6.

(*f*) Sect. 37.

(*g*) See *Re Forster's Settled Estates*, 24 Beav. 220; 1 De G. & Jo. 386; and compare *Re Turbutt*, 2 N. R. 158.

(*h*) *Re Lord de Tabley's Settled Estates*, 11 W. R. 936.

(*i*) As to which *vide infrà*.

be a similar extension in cases not fit subjects for a partition suit, by removing some of the restrictions and formalities which are always a serious obstacle, and frequently an insuperable bar to the statutory remedy. Such an extension has been partially provided by the 37 & 38 Vict., c. 33. Chap. XX. Sect. 1.

(2.) *Confirmation of Sales Act.*

Section 2.

Confirmation of Sales Act.

By the Confirmation of Sales Act (*k*), after giving retrospective validity to sales by trustees of land, with an exception of minerals, though not expressly authorized by the terms of the trust or power under which the sale was made, it is enacted that "every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals; or may (unless forbidden as aforesaid), dispose of, by way of sale, exchange, or partition, the minerals with or without such rights or powers separately from the residue of the land; and, in either case, without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be), the undisposed of land (*l*)." Before, however, any such disposition is made, the sanction of the Court of Chancery must be obtained on petition in a summary way; but when once obtained, no further application is necessary for its future exercise (*m*).

Buckley v. *Howell.*

This short Act was rendered necessary by the decision in *Buckley* v. *Howell* (*n*), which threw considerable doubt on the validity of sales by trustees, under the common power, of the surface apart from the minerals. In that case the property was devised to trustees for a term upon trusts for payment of debts, &c., and subject thereto to A. for life,

(*k*) 25 & 26 Vict. c. 108.

(*l*) Sect. 2.

(*m*) For form of petition, see Dan. Ch. Forms, 2054.

(*n*) 29 Beav. 546.

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without impeachment of waste, with limitations over in strict settlement; and after giving to any person in possession power to demise all or any of the mines, whether opened or not, the will empowered the trustees at the request of A. during his life absolutely to make sale of *all or any* part of the devised estate. The trustees having contracted to sell the surface, with a reservation of the minerals, the purchaser objected that this was not a valid exercise of the power, and Lord Romilly, on the authority of *Cholmondeley* v. *Paxton* (o), held that the objection was a good one. The principle of this decision was, that the power ought not to be so exercised as to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised; and that this would be the case if the purchase-money for the surface of the settled estate were re-invested in land with valuable minerals under it, inasmuch as the tenant, being unimpeachable for waste, might thus obtain the minerals out of the two estates; and it was stated that the remaindermen would have no equity to restrain the tenant for life from working the mines under the purchased estate (p). The grounds of this decision do not seem satisfactory. The risk of litigation and of giving an undue advantage to a tenant for life may be a sufficient reason why, as a matter of discretion, a trustee ought not so to exercise his power, but ought not to invalidate the exercise of the power as respects a purchaser; nor does the same reasoning apply where there is a trust for sale of the whole or any part of the land. The Act, however, it will be observed, draws no distinction between the two cases.

Cases and mode of procedure under the Act.

It would seem, from the language of the Act, as if it was intended to apply only to the case of express trustees; but in an unreported case, where a mortgagor had died, leaving an infant heir, and an immediate sale of the minerals apart from the surface was proved to be very advantageous, the

(o) 3 Bing. 207; in which it was held that trustees, having a power of sale only, could not sell the estate without the timber, or *vice versâ*.

(p) See 29 Beav. p. 538, and *quære*.

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mortgagee, having a power of sale, was held to be a trustee within the meaning of the Act, and the sale was sanctioned by the Court (q); and this decision has been followed in later cases (r). All parties who are beneficially interested should be served with notice of any application under the Act (s): but in one case it was held that a petition by trustees, who had a power of sale with the consent of the tenant for life, need not be served on the persons entitled in remainder (t); and an order will be made in general terms, without reference to any particular sale (u). The necessity of applying to the Court is, in the case of all well-drawn settlements, since the passing of the Act, avoided by the insertion of a power to sell the minerals apart from the surface, or *vice versâ*, wherever minerals are known, or are supposed, to exist (x).

(3.) *Partition Act*, 1868.

Section 3.

Partition Act, 1868.

By the Partition Act, 1868 (y), "in a *suit* for partition where, if the Act had not been passed, a decree for partition might have been made; then, if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested, or presumptively interested, therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property, and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and give

(q) *Re S. Jackson's Mortgage*, V.-C. M., 27 Feb., 1869.

(r) See *Re Beaumont's Mortgage Estate*, L. R. 12 Eq. 86; *Re Wilkinson's Mortgaged Estates*, L. R. 13 Eq. 634.

(s) *Re Brown*, 11 W. R. 19; 1 N. R. 13, and see *Re Palmer's Will*, L. R. 13 Eq. 408.

(t) L. R. 10 Eq. 531.

(u) *Re Willway's Trusts*, 1 N. R. 469, V.-C. W.

(x) See Lewin, 6th ed., 382, n.; Dav. Conv. vol. iii, pp. 477, 897, *in notis*, and vol. iv., pp. 30, 31, where a form is given.

(y) 31 & 32 Vict. c. 40.

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all necessary or proper consequential directions (z);" and "if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among them, the Court *shall*, unless it sees good reason to the contrary, direct a sale of the property accordingly (a);" and "if *any* party interested in the property to which the suit relates, requests the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court *may*, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit (b)."

Mode of procedure under the Act.

On any sale under the Act, any of the parties interested may be authorized to bid (c), and the provisions of the 30th section of the Trustee Act, 1850 (d), and of sections 23 to 25 of the Leases and Sales of Settled Estates Act as to the application of the proceeds of sale (e), are extended to the case of a sale effected under the authority of this Act (f). In an ordinary partition suit, it is essential that all persons legally interested should be parties, before a decree or order for partition can be obtained (g); but the Act provides that such a suit may be maintained against one or more of the

(z) Sect. 3; which is retrospective, and applies to a suit instituted before the Act. See *Lys* v. *Lys*, L. R. 7 Eq. 126; but the Court cannot under this section direct a sale in a suit, where a decree for partition though not acted on, was made *before* the passing of the Act; *Pryor* v. *Pryor*, L. R. 19 Eq. 595; affd. L. R. 10 Ch. Ap. 469.

(a) Sect. 4; this section is imperative; see *Pemberton* v. *Barnes*, L. R. 6 Ch. Ap. 685, *infrà*, p. 1188.

(b) Sect. 5.

(c) Sect 6.

(d) *I.e.*, as to declaring any persons to be trustees.

(e) *Vide suprà*, p. 1178.

(f) Sects. 7 and 8.

(g) See Seton, 579.

persons interested without service upon the others; who must, however, be served with notice of the decree or order on the hearing (*h*). The jurisdiction conferred by the Act may be exercised by County Courts, where the property to which the suit relates does not exceed five hundred pounds (*i*).

How sale effected before the Act.

Before this Act was passed, an order for sale could only be obtained in a partition suit, where any of the parties interested were infants, by the circuitous process of first obtaining a declaration that their costs of suit were properly chargeable on their shares; and the Court, on being satisfied that a sale would be for the benefit of the infants, would then make an order for the sale of the entirety, instead of a partition (*k*); and where the plaintiff requesting the sale is an infant, it seems to be still necessary to go through the form of having his costs of suit declared a charge on his share of the estate (*l*). But the Court can direct a sale at the request of a married woman, not entitled to her separate use (*m*). It has been held that the next friend of a person of unsound mind, not so found by inquisition, cannot on his behalf file a bill for the partition of his real estate (*n*).

Act only applies where there is a suit for partition.

It will be observed that by an apparent oversight, the Act applies only where there is a *suit* for partition, so that, as a matter of form, it is still necessary that the bill should pray for a partition, and in the alternative for a sale under the Act (*o*).

Cases under the Act.

The *onus* of showing that a sale ought not to be directed

(*h*) Sect. 9; and *vide infrà* and cases there cited.

(*i*) Sect. 12.

(*k*) *Thackeray* v. *Parker*, 1 N. R. 567; *Davis* v. *Turvey*, 32 Beav. 554; *Hubbard* v. *Hubbard*, 2 H. & M. 38; which see for form of order.

(*l*) *France* v. *France*, L. R. 13 Eq. 173; *Young* v. *Young*, *ib.* 175; and see *Grove* v. *Comyn*, L. R. 18 Eq. 387.

(*m*) *Higgs* v. *Dorkis*, L. R. 13 Eq. 280.

(*n*) *Halfhide* v. *Robinson*, L. R. 9 Ch. Ap. 373.

(*o*) *Teall* v. *Watts*, L. R. 11 Eq. 213; *Holland* v. *Holland*, L. R. 13 Eq. 406; and *vide contrà*; *Aston* v. *Meredith*, 11 Eq. 601.

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is by the Act thrown upon the parties who oppose it (*p*); and where the owners of at least a moiety of the estate desire a sale, the Court must order it, unless some good reason is shown to the contrary, or unless the persons objecting to a sale offer to purchase the shares of the parties desiring it; in which case the Court has a discretion to authorize them to do so (*q*). Where a partition of part of the property and a sale of the rest is desired, this may be obtained in the same suit (*r*): but where one part-owner desires a sale and others a partition, the Court cannot order a sale of his share to his co-owners at a valuation, and then direct a partition (*s*). It has been held that the Court has discretion to direct an immediate sale where all persons in existence who are interested in the estate are before the Court, and the title is proved at the hearing (*t*); so also, in the absence of parties interested, who are shown to be out of the jurisdiction; but if there is any uncertainty as to whether they are out of the jurisdiction or not, an inquiry will, in the first instance, be directed (*u*). The Court will not allow a decree for sale to be acted on in the absence of parties interested who are out of the jurisdiction, until notice of it has been served, or at any rate advertised (*x*).

Sale before certificate.

Where by the decree a sale was directed if on inquiry it was found that a sale would be more beneficial than a partition, and that all the parties interested were before the Court, and the sale took place before the Chief Clerk had made his certificate, it was held that the purchaser who objected to the title on this ground, was entitled to be discharged from his contract (*y*). It is well settled that a

(*p*) See *Lys* v. *Lys*, L. R. 7 Eq. 126, where the interests were equally divided, and yet a sale was directed.

(*q*) Per Lord Hatherley, C., in *Pemberton* v. *Barnes*, L. R. 6 Ch. Ap. 685, 694.

(*r*) *Roebuck* v. *Chadebet*, L. R. 8 Eq. 127.

(*s*) *Williams* v. *Games*, L. R. 10 Ch. Ap. 204.

(*t*) *Lees* v. *Coulton*, L. R. 20 Eq. 20.

(*u*) *Silver* v. *Udall*, L. R. 9 Eq. 227.

(*x*) *Peters* v. *Bacon*, L. R. 8 Eq. 125; *Hurry* v. *Hurry*, L. R. 10 Eq. 346; *Teall* v. *Watts*, L. R. 11 Eq. 213.

(*y*) *Powell* v. *Powell*, L. R. 10 Ch. Ap. 130.

sale may be directed by the decree, conditionally on the inquiries being satisfactorily answered (z); and this is the ordinary practice, even where further consideration is reserved as to the application of the sale moneys. Chap. XX. Sect. 3.

Costs. Previously to this Act, the ordinary rule as to costs in a partition suit was that none were given on either side up to the hearing, and that the subsequent costs were borne by the parties according to their interests (a): but under the Act a discretionary power as to costs up to the hearing is given to the Court (b). It was at first held that this provision did not alter the old rule (c); but, in later cases, it has been decided that where the parties are entitled in equal shares, and a sale is for their common advantage, the costs will be paid out of the estate (d). So, where the parties are entitled in unequal shares, the costs of the suit up to the hearing as well as the subsequent costs will, in the absence of special circumstances, be thrown on them in proportion to their interests (e).

We may here refer to the power of the Court to direct a sale of lands delivered in execution to a judgment creditor under the 27 & 28 Vict. c. 112 (f); and to the provisions of the 15 & 16 Vict. c. 86, s. 48 (g), under which the Court may now direct a sale instead of a foreclosure.

(z) *Ib.*; and for form of order see *Harper* v. *Bird*, W. N. 1875, p. 91.

(a) See Seton, 578.

(b) Sect. 10.

(c) *Landell* v. *Baker*, L. R. 6 Eq. 268.

(d) *Osborn* v. *Osborn*, L. R. 6 Eq. 338; *Miller* v. *Marriott*, L. R. 7 Eq. 1; *Simpson* v. *Ritchie*, L. R. 16 Eq. 103, where the plaintiffs owned one-half, the defendants one-fourth, and the parties served with the decree the remaining one-fourth of the estate.

(e) *Cannon* v. *Johnson*, L. R. 11 Eq. 90.

(f) As to which, *vide suprà*, p. 475.

(g) *Vide* Ch. XXI.

Chap. XXI.

CHAPTER XXI.

AS TO SALES BY THE COURT OF CHANCERY OR THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE.

1. *As to the time for, conduct of, and manner of the sale.*

2. *As to the rights and liabilities of the highest bidder, after the sale, but before the certificate of the result of the sale becomes absolute;—and as to the late practice of opening biddings.*

3. *As to the purchaser's rights and liabilities after the certificate of the result of the sale becomes absolute.*

4. *As to the investigation of title;—payment and application of purchase-money;—possession;—and preparation and execution of the conveyance.*

5. *As to the purchaser's rights after completion.*

6. *As to the practice where the purchaser fails to complete.*

Section 1.

As to the time for, conduct of, and manner of the sale.

Sale by Court may be by auction or private contract.

(1.) AN estate, when sold by the Court, is usually sold by public auction; the Court will, however, at once accept an advantageous offer actually made for the property (*a*); and if the affidavits on an application in Court are satisfactory, the matter need not be referred to chambers (*b*). Occasionally a sale is effected by means of sealed tenders sent into the Judge's chambers (*c*); or by auction before the Chief Clerk (*d*): but where the order is for a sale by public auction, and an abortive attempt is made to sell in that way, a further order should be obtained before the estate can be sold by means of sealed tenders (*e*).

(*a*) See *Dowle* v. *Lucy*, 4 Ha. 311; *Boufield* v. *Hodges*, 33 Beav. 90. For form of order confirming a contract, see Seton, 1198.

(*b*) *Pimm* v. *Insall*, 10 Ha. App. lxxiv.

(*c*) *Osborne* v. *Foreman*, 2 Jur. N.S. 361; 8 De G. M. & G. 122; affirmed *sub nomine*, *Barlow* v. *Osborne*, 6 H.L. Ca. 566; 4 Jur. N. S. 361; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636.

(*d*) *Pemberton* v. *Barnes*, L. R. 13 Eq. 349.

(*e*) *Berry* v. *Gibbons*, L.R. 15 Eq. 150

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When made in administration suit.

Where the decree in an administration suit directed the Master to inquire and state what real estate passed by the will, and that the estates which he should find to have passed be sold with his approbation, it was held that he might, after having informed himself what estates passed, proceed to sell them, without making any previous report upon the preliminary inquiry (*f*): but where an infant was interested in the real estate, it was doubtful whether the Court would direct a sale until the accounts had been taken, and the cause had been heard on further directions (*g*). But now, a sale may be made in any suit before decree (*h*): but only in cases where under the old practice a sale could have been directed at the hearing (*i*), and in which for the protection of the property or other like cause it is necessary to come to the Court; and not so as to enable a party in a contested suit, and upon an interlocutory application before the hearing, to obtain a decision upon the main questions at issue in it (*k*). A sale may, if necessary, be directed for payment of costs, although infants are interested (*l*).

Sale may now be directed before decree.

When sale will not be directed in an administration suit.

But a sale will not be ordered in an administration suit, when the testator has himself directed all necessary expenses to be raised by mortgage (*m*): so, where a testatrix directed that an advowson which she devised to trustees should be sold by them immediately after the death of the then incumbent, the Court refused, in his lifetime, to direct a sale of the next presentation for the benefit of the *cestuis que trust* (*n*). As against a specific incumbrancer, a sale cannot be directed in an administration suit

(*f*) *Dykes* v. *Taylor*, 16 Sim. 563; but see and compare *Powell* v. *Powell*, L. R. 10 Ch. Ap. 130, and *vide suprà*, p. 1188.

(*g*) See *Baillie* v. *Jackson*, 10 Sim. 167, where Sir L. Shadwell, V.-C., refused to insert a direction for sale in the decree; but, in Lord St. Leonards' opinion, there is no invariable rule upon the subject; see *Lynch* v. *Joyce*, 3 Dru. & W. 349.

(*h*) 15 & 16 Vict. c. 86, s. 55.

(*i*) *Mandeno* v. *Mandeno*, Kay, App. ii.

(*k*) *Prince* v. *Cooper*, 16 Beav. 546; *Tulloch* v. *Tulloch*, L. R. 3 Eq. 574.

(*l*) *Mandeno* v. *Mandeno*, *suprà*; and *vide suprà*, p. 1187, and cases cited in n. (*k*).

(*m*) *Drake* v. *Whitmore*, 5 De G. & S. 619.

(*n*) *Bristow* v. *Skirrow*, 27 Beav. 590.

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without his express consent, except subject to his charge (*o*). Where trustees with a discretionary power of sale disclaim, the Court will exercise the power, although infants are interested (*p*).

Under 3 & 4 Will. IV. c. 104, in suit by person claiming under will.

The Court may sell the real estate of a testator for payment of his debts under the 3 & 4 Will. IV. c. 104, although the suit be instituted by a person interested under the will, instead of by a creditor (*q*); so, also, for the purpose of raising the arrears of a rent-charge (*r*).

Sale when directed in a foreclosure suit.

And a sale, even of an infant's estate (*s*), may now be directed (*t*) in a foreclosure suit, at the hearing; but not on a prior interlocutory application (*u*); nor, it would seem, after a decree for foreclosure (*x*), except by consent (*y*); nor on the application of the mortgagor, unless he make a deposit to cover the probable expenses of the sale (*z*); and the money so paid into Court is, in the first instance, to be applied in indemnifying the mortgagee entitled to a foreclosure decree, against any costs which he may incur by the sale, or attempted sale (*a*). A sale may be directed, notwithstanding the dissent of the mortgagor (*b*), or some of

(*o*) *Langton* v. *Langton*, 1 Jur. N. S. 1078; 7 De G. M. & G. 30; *Wickenden* v. *Rayson*, 25 L. J. Ch. 162, affd. 27 L. T. 50; 6 De G. M. & G. 210; Seton, 1182. See under 15 & 16 Vict. c. 86, s. 48, *Wickham* v. *Nicholson*, 19 Beav. 38, where a sale instead of a foreclosure was ordered, notwithstanding the dissent of a mortgagee, and *vide infrà*.

(*p*) *Browne* v. *Paull*, 16 Jur. 707; V.-C. K.; and see *Prentice* v. *Prentice*, 10 Ha. App. xxii.

(*q*) *Price* v. *Price*, 15 Sim. 484; *Rodney* v. *Rodney*, 16 Sim. 307; *Dinning* v. *Henderson*, 2 Coll. 330; as to a sale for payment of legacies, see *Rowley* v. *Adams*, 7 Beav. 548.

(*r*) *White* v. *James*, 26 Beav. 191.

(*s*) *Mears* v. *Best*, 10 Ha. App. li.; *Siffken* v. *Davis*, Kay, App. xxi.

(*t*) See 15 & 16 Vict. c. 86, s. 48; *Jenkin* v. *Row*, 5 De G. & S. 107; and for form of order, see *Staines* v. *Rudlin*, 9 Ha. App. liii., n.; *Cator* v. *Reeves*, 16 Jur. 1004.

(*u*) *Wayn* v. *Lewis*, 1 Dre. 487.

(*x*) *Girdlestone* v. *Lavender*, 9 Ha. App. liii.; *Campbell* v. *Moxhay*, 18 Jur. 641; but see *Laslett* v. *Cliffe*, 2 Sm. & G. 278.

(*y*) *Laslett* v. *Cliffe*, 2 Sm. & G. 278.

(*z*) *Boydell* v. *Manby*, 9 Ha. App. liii.; *Bellamy* v. *Cockle*, 18 Jur. 465; and see *Whitfield* v. *Roberts*, 5 Jur. N. S. 113.

(*a*) *Corsellis* v. *Patman*, L. R. 4 Eq. 156.

(*b*) *Newman* v. *Selfe*, 33 Beav. 522.

the incumbrancers (c); so, also, although the mortgage deed contains the usual power of sale, and the bill prays only for a sale, and not for foreclosure (d). Where a sale was directed at the instance of a *puisne* incumbrancer, besides a deposit to cover the probable sale expenses, a bidding was ordered to be reserved sufficient to cover the amount found due to the first mortgagee (e); and where a second mortgagee of a moiety of the estate was plaintiff, the conduct of the sale was given to a defendant, the first mortgagee of the entirety, as being a more convenient and less expensive course (f).

An immediate sale ordered only under special circumstances.

As a general rule, an immediate sale will not be ordered, unless all parties interested in the equity of redemption are before the Court and give their consent: but, as in the case of foreclosure, a day is in the first instance fixed for payment; and in default of payment a sale is directed (g). Where, however, the mortgaged property consisted of leaseholds, the rents of which were insufficient to keep down the interest and other charges upon it, an immediate sale was ordered at the instance of the first mortgagee (h); so, also, in other cases where special circumstances made this the most desirable course (i); but this discretionary power is to be exercised (unless with consent) only under special circumstances,—*e.g.*, where there is such a complication of interests that the common decree could not be conveniently worked out (k)—and is to be exercised for the general benefit of the estate, and not so as to operate injuriously or oppressively on any person interested (l).

(c) *Wickham* v. *Nicholson*, 19 Beav. 38.

(d) *Hutton* v. *Sealy*, 4 Jur. N. S. 450; see too *Macrae* v. *Ellerton*, *ib.* 967.

(e) *Whitfield* v. *Roberts*, 5 Jur. N. S. 113.

(f) *Hewitt* v. *Nanson*, 28 L. J. Ch 49, V.-C. K.; 7 W. R. 5.

(g) See *Smith* v. *Robinson*, 1 Sm. & G. 140.

(h) *Phillips* v. *Gutteridge*, 4 De G. & Jo. 531; *Foster* v. *Harvey*, 12 W. R. 92, L. J. J.

(i) *Marriot* v. *Kirkham*, 10 W. R. 340; *Newman* v. *Selfe*, *ubi suprà*. As to a sale being ordered against the Crown, see *Scott* v. *Roberts*, 4 W. R. 499, and cases there cited.

(k) See *Hiorns* v. *Holton*, 16 Jur. 1077; *Wickham* v. *Nicholson*, 19 Beav. 38; *Probert* v. *Price*, 1 Eq. R. 51.

(l) *Hurst* v. *Hurst*, 16 Beav. 372; and see *Smith* v. *Robinson*, 1 Sm. & G. 140.

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Whether sale or foreclosure is the appropriate remedy for an equitable mortgagee.

It has been much doubted whether sale or foreclosure is the proper remedy for an equitable mortgagee; and a distinction has been sometimes drawn between a case where the mortgagee has an agreement for a legal mortgage and a case where he has a mere equitable charge. The preponderance of modern authorities is in favour of a decree for sale (*m*): but the Lords Justices, on the authority of a previously unreported decision of the Court of Appeal, have recently held that the relief to which an equitable mortgagee by deposit is entitled, is foreclosure, not sale (*n*). And the rule as there laid down would seem to apply to every description of equitable charge; unless the parties consent to, or the Court in the exercise of its discretionary power under the 15 & 16 Vict. c. 86 directs, a sale (*o*). Whether a registered judgment creditor, prior to the recent statute, was entitled to a sale, or to an absolute conveyance of the property free from all equity of redemption has been the subject of conflicting decisions; but the balance of authority seems to prescribe the latter remedy (*p*). When the land has been delivered in execution, or he has exhausted as far as possible the forms of legal process, he may now obtain a summary order for sale under the late Judgment Act (*q*).

In one case, where property was conveyed to two sons of the settlor upon trusts for his children, &c., and the deed provided that any child advancing money to the settlor, or towards the discharge of a mortgage then subsisting on the

(*m*) Per Lord Hatherley, C., in *Tennant* v. *Trenchard*, L. R. 4 Ch. Ap. 537, 542; and see *Footner* v. *Sturgis*, 5 De G. & S. 736; *Lloyd* v. *Whitley*, 17 Jur. 754, V.-C. W.; *Nash* v. *Worcester Commissioners*, 1 Jur. N. S. 973, V.-C. W.; and see *Tuckley* v. *Thompson*, 1 J. & H. 126. For cases directing a sale, see *Pain* v. *Smith*, 2 My. & K. 417; *Tipping* v. *Power*, 1 Ha. 410; *Matthews* v. *Goodday*, 8 Jur. N. S. 90, V.-C. K.; and for cases directing foreclosure, see *Price* v. *Carver*, 3 My. & C. 163; *Creswick* v. *Harrison*, *ib.* 444; *Moore* v. *Perry*, 1 Jur. N. S. 126; see too *Jones* v. *Bailey*, 17 Beav. 582; *Cox* v. *Toole*, 20 Beav. 145.

(*n*) *James* v. *James*, L. R. 16 Eq. 153; *Pryce* v. *Bury*, *ib.*

(*o*) Seton, 448, 449, and cases there cited.

(*p*) *Footner* v. *Sturgis*, 5 De G. & Sm. 736; *Simpson* v. *Morley*, 2 K. & J. 71; but see *Jones* v. *Bailey*, 17 Beav. 582.

(*q*) 27 & 28 Vict. c. 112, s. 4, and *vide suprà*, p. 475.

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property, should be entitled to "a charge by way of mortgage," it was held by Lord Hatherley, C., reversing V.-C. Giffard, that a trustee, who had advanced a considerable sum to the settlor and paid off part of the mortgage debt, was only entitled to a sale of so much of the estate as was necessary to repay the advances, and not to a formal mortgage giving him the right to foreclose; and his lordship, without however deciding the case on this ground, appears to have considered that where a trustee is also mortgagee, the Court, in order to prevent the conflict of duty and interest, will not allow him to foreclose (*r*).

Who may bid.

As a general rule, no party to the suit ought to bid for the estate without the previous permission of the Court (*s*); and the party permitted to bid will not be allowed to conduct the sale (*t*); and where, without such permission, the party conducting the sale purchased, and under a feigned name, the Court, even after the purchase had been confirmed, ordered the estate to be put up again at the price for which he had bought it; and if there should be no higher bidding, he was to be held to his bargain (*u*). A residuary legatee (*x*), or tenant for life, or owner of a reversionary interest in the estate, may, (subject to the above restriction), purchase on a sale by the Court; and Lord Eldon, although disapproving of the rule, has referred to its existence as free from doubt (*y*). But leave to bid has been refused to an executor in an administration suit (*z*); so also, to a receiver (*a*), and to a guardian *ad litem* (*b*). The stringency of the rule may,

(*r*) *Tennant* v. *Trenchard*, L. R. 4 Ch. Ap. 537, 544.

(*s*) *Elworthy* v. *Billing*, 10 Sim. 98; Sug. 99; but see *Wilson* v. *Greenwood*, 10 Sim. 101, n.; and see *Tennant* v. *Trenchard*, L. R. 4 Ch. Ap. 537, 546, 547.

(*t*) See *Domville* v. *Berrington*, 2 You. & C. 723.

(*u*) *Sidny* v. *Ranger*, 12 Sim. 118; such an order may be brought under the review of the House of Lords by a purchaser, although he is not a party to the cause; *Banley* v. *Maule*, 7 Cl. & F. 121, n.

(*x*) *Hooper* v. *Goodwin*, G. Coop. 95.

(*y*) See *Williams* v. *Attenborough*, Turn. & R. 76.

(*z*) *Geldard* v. *Randall*, 9 Jur. 1085.

(*a*) *Alvine* v. *Bond*, 1 Flan. & K. 196.

(*b*) *Dodson* v. *Bishop*, Seton, 1184.

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however, be relaxed where all parties who are *sui juris* consent, and an advantageous sale cannot be otherwise effected (*c*),

Who conducts sale.

In general, the plaintiff conducts the sale (*d*); in which case his solicitor is considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit (*e*); the Court, however, may, if it be probably for the benefit of the parties to the suit, and a sufficient case is made out, give the conduct of the sale to a person other than the plaintiff (*f*); and, in determining the question, does not necessarily consider the extent of the interests of the several parties, nor the possession of the title deeds; inasmuch as every party to the suit is bound to facilitate the sale (*g*).

Court when executing trust, cannot anticipate time thereby fixed for sale.

Where a suit is instituted to carry into execution the trusts of an instrument which directs a sale upon the occurrence of a specified event, and some of the parties interested in the proceeds of sale are not *sui juris*, the Court, has no power, under its general jurisdiction, to direct a sale before the occurrence of such event (*h*); however injurious delay may be to the property (*i*); nor even, it would seem, where all the parties are *sui juris*, if the intention of the testator in fixing a time for sale would be defeated (*k*).

Sale may be in town or country.

Assuming the Court to have properly directed a sale, the estate may be sold at such place either in London or in the country, and by such person, as the Court shall think fit (*l*). A sale in a manner different from that directed by the decree, and unperfected by conveyance, will be treated as a nullity (*m*).

(*c*) *Campbell* v. *Walker*, 5 Ves. 678 682, and see *Farmer* v. *Dean*, 32 Beav. 327; *Tennant* v. *Trenchard* L. R. 4 Ch. Ap. 547.

(*d*) See *Dale* v. *Hamilton*, 10 Ha App. vii.

(*e*) *Dalby* v. *Pullen*, 1 Russ. & M 296.

(*f*) *Dixon* v. *Pyner*, 7 Ha. 331 and see *Hewitt* v. *Nanson*, 28 L. J Ch. 49, and *suprà*, p. 1191.

(*g*) *Knott* v. *Cottee*, 27 Beav. 33.

(*h*) *Blacklow* v. *Laws*, 2 Ha. 40.

(*i*) *Johnstone* v. *Baber*, 8 Beav. 233

(*k*) *Bristow* v. *Skirrow*, 27 Beav 590, *et vide suprà*, p. 1191.

(*l*) Ord. XXXV. 61.

(*m*) *Annesley* v. *Ashurst*, 3 P. Wms 282; *Ex parte Hughes*, 6 Ves. 617 *Bowen* v. *Evans*, 1 J. & L. 178, 266.

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Relative duties of vendors and purchasers prior to sale.

The general rules, to which we have before adverted, respecting the relative duties of intended vendors and purchasers prior to the contract, apply as well to sales under an order of the Court as to ordinary sales: *e.g.*, puffing cannot be supported in the one case more than in the other (*n*).

Particulars of property to be sold.

Where the sale is made in an administration suit, the trustees or other real representatives of the deceased person must make an affidavit (*o*) as to the particulars of the real estate, and the incumbrances affecting it; and in other cases similar evidence is required by the Court. The particulars of sale are prepared by the solicitor of the party conducting the sale, and are in the ordinary form, except that they are intituled in the cause or matter, and that the sale is stated to be made with the approbation of the Judge, under a decree or order. The solicitor of the party conducting the sale also prepares the abstract, which before the property is offered for sale, must, according to the present practice, "be laid before some conveyancing counsel to be approved by the Court for the opinion of such counsel thereon, to the intent that the Court may be better enabled to give such directions as may be necessary respecting the conditions of sale and other matters connected therewith;" and a time for the delivery of the abstract to the purchaser or his solicitor is to be specified in the conditions (*p*). Under this provision the abstract, with a copy of the particulars as settled in chambers, and a draft of the ordinary formal conditions employed on sales by the Court, is usually laid before one of the six conveyancing counsel of the Court; with instructions to advise whether the sale should be made subject to any and what special conditions (*q*). The Court may, however, dispense

Preparation of abstract.

To be laid before conveyancing counsel.

(*n*) *Dimmock* v. *Hallett*, L. R. 2 Ch. Ap. 21, 29; and see Sug. 109.

(*o*) As to the form of such affidavit, see Regul. 8 Aug. 1857, sched. No. 6.

(*p*) 15 & 16 Vict. c. 86, s. 56.

(*q*) A form of the common conditions ordinarily used on sales by the Court will be found in the 1st vol. of Davidson's Conveyancing; and see Regul. 8 Aug. 1857, sched. No. 7.

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with this rule, upon the ground of expense (*r*), or for any other special reason (*s*).

In considering the conditions, the expression "the vendors," if unexplained, has been held by V.-C. Wood, at chambers, to include *all* the parties to the suit.

Court will not knowingly allow defective title.

The Court will not knowingly pass off an absolutely bad title by the aid of special conditions (*t*); however, since the last edition of this work was published, in a case where there was an apparently good title commencing with a recent assurance on the purchase by a late owner, but a defect, which had then apparently been overlooked, existed in the prior title, such defect consisting in a possible claim to a reversionary estate for life in a part of the property, the enjoyment of which was essential to the enjoyment of the residue, Lord Romilly, M. R., and than whom there has been no more conscientious Judge, upon the matter being brought before him privately at chambers, decided that the property should be put up for sale under a condition that the abstract to be delivered to the purchaser at the expense of the vendors should commence with the assurance above referred to; but that the purchaser might have a full abstract of the prior title if he chose to pay for it, and was to be allowed to investigate it; which it was considered very unlikely that he would do. The case was a very difficult one; for the sale, which was in a creditors' suit, was a matter of necessity; and to explain the real state of the earlier title would have been instantly to bring down a claim which was not based on any moral equity; and which, in the absence of such disclosure, in all probability will never be made.

Particulars and conditions settled in chambers.

When the conveyancing counsel has added such special conditions as he thinks necessary, the particulars and conditions are finally settled in chambers, the time and place

(*r*) *Chamberlain* v. *Chamberlain*, 1 Sm. & G. App. 28.

(*s*) *Gibson* v. *Wollard*, 5 De G. M. & G. 835; *Re Jones*, 1 Jur. N. S. 817.

(*t*) *Bennett* v. *Wheeler*, 1 Ir. Eq. 18; and see *Hume* v. *Bentley*, 5 De G. & S. 527; *Nunn* v. *Hancock*, L. R. 6 Ch. Ap. 850.

of sale are fixed, and the auctioneer is appointed, and the amount of his remuneration is determined (*u*).

Reserved bidding and deposit.

The common conditions provide for a reserved bidding, and also for the payment of a deposit by the purchaser: the latter, however, is often not required. When a deposit is paid the person appointed to receive it must usually give security (*x*). Under the old practice, the Court has refused to sanction its payment to the Master's clerk, but has allowed it to be paid to the solicitors of a defendant in the cause, they undertaking by counsel to account for it, and the defendant submitting to be bound by any future order which the Court might make respecting it (*y*).

Highest bidding by person incompetent, or of insufficient means—effect of.

If an incompetent person, (as a lunatic,) is declared the highest bidder, the Court cannot hold the next bidder to his bidding, or even allow him to stand as purchaser with the consent of the parties to the cause (*z*). In a modern case, where the offer of the highest bidder was rejected, under the idea that he was of insufficient means, and the next bidder was declared the purchaser, the Court did not treat the sale as void; but seemed to consider that the highest bidder should have moved that he, instead of the other, might be declared the purchaser (*a*).

Bidding after estate bought in.

Where a purchaser made an offer after the auctioneer had declared the amount of the reserved bidding, it was held that this was an offer respecting which a special application to the Court was necessary (*b*): but in one case, where the property was bought in, but before the auctioneer left the rostrum, a person, to whom the reserved price had been improperly divulged, agreed to purchase for that amount, the contract was held to be binding upon him (*c*); and the

(*u*) See Dan. Chr. Pr. 1171, 1172.

(*x*) Dan. Ch. Pr. 1173.

(*y*) *Lyon* v. *Colvill*, 6 Jur. 680, V.-C. K. B.

(*z*) Sug. 102; *Blackbeard* v. *Lindigren*, 1 Cox, 205; *sed quære*, whether the Court might not treat the case as one of an offer to purchase by private contract.

(*a*) *Hughes* v. *Lipscombe*, 6 Ha. 142.

(*b*) *Dowle* v. *Lucy*, 4 Ha. 311.

(*c*) *Else* v. *Barnard*, 28 Beav. 228; affirmed, 232; and see *Bousfield* v. *Hodges*, 33 Beav. 90.

learned Judge observed that it is very usual for the reserved bidding to be known; and a constant practice for persons to take the property at the reserved bidding (*d*).

Section 2.

As to the rights and liabilities of highest bidder, &c.

(2). *As to the rights and liabilities of the highest bidder, after the sale, but before the certificate of the result of the sale becomes absolute;—and as to the late practice of opening biddings.*

Highest bidder not the purchaser until certificate of sale becomes absolute.

After the sale, the chief clerk of the Judge to whose branch of the Court the cause is attached, proceeds, on a day named in the conditions of sale, to certify the result; and the purchasers may, if they think fit, attend at chambers, by their solicitors, to settle the certificate. The certificate having been settled is signed by the Judge and filed; with the same result as under the old practice attended the order *nisi* confirming the Master's report of the sale: and after eight days, if no application be made in the interval to discharge or vary it, becomes absolute; with the same result as, under the old practice, attended the confirmation absolute of the Master's report; and will not be opened except upon very special grounds (*e*). Until the certificate becomes absolute the bidder has not absolutely assumed the character of purchaser: so that in the interval a loss by fire falls on the vendors (*f*): and a motion that the best bidder shall complete, and pay his purchase-money, by a certain day, will be refused (*g*): but, if the interest purchased be, in its own nature determinable—*e g*, a life estate—it seems that he must pay the purchase-money, although the event upon which the interest determines, occur before the certificate

(*d*) And see Sug. 96; Dan. Ch. Pr. 1175.

(*e*) See 15 & 16 Vict. c. 80, ss. 32, 33, 34, and the Orders of 16 Oct. 1852, No. 47, *et seq.*; and *Bridger* v. *Penfold*, 1 K. & J. 28; *Ware* v. *Watson*, 25 L. J. Ch. 199; 7 De G. M. & G. 739; *Howell* v. *Kightley*, 4 W. R. 477; 8 De G. M. & G. 325; *Re Jones' Settled Estates*, 5 Jur. N. S. 1243.

(*f*) *Ex parte Minor*, 11 Ves. 559; cited 13 Ves. 518.

(*g*) *Anon.*, 2 Ves. jun. 335.

becomes absolute (*h*); so, if the certificate become absolute, he will, in the case of a life estate, be entitled to the intermediate income (*i*).

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Death of, before certificate becomes absolute.

The death of the purchaser before the certificate becomes absolute, does not, however, vacate the sale, even although he never signed an agreement; sales by the Court, not being within the Statute of Frauds (*k*); but the contract, it is said, cannot be enforced against his representatives without suit (*l*); and it was the practice in such a case not to serve the heir with notice of an application to open the biddings (*m*).

Sub-sale at profit.

If, before the certificate becomes absolute, the purchaser resell at a profit, the sub-purchaser becomes the purchaser under the Court at the advanced price (*n*): in a modern case, where the first purchaser had received the advance in price and had absconded, the Court directed the property to be resold: reserving the question whether, if it should not produce the sum offered by the sub-purchaser, he should not be answerable to the Court for the difference; and reserving all questions of liability in the original purchaser (*o*); and, in another case, where before the certificate became absolute, the original purchaser sold at a profit, a re-sale was ordered, upon the terms of his paying into Court the amount of the advance offered by the sub-purchaser (*p*).

Opening biddings—what is.

Until the certificate became absolute (*q*), the purchaser

(*h*) *Anson* v. *Towgood*, 1 Jac. & W. 639; and see *Vesey* v. *Elwood*, 2 Con. & L. 47; 3 Dru. & W. 74, overruling *Vincent* v. *Going*, cited *ibid.* p. 75.

(*i*) *Anson* v. *Towgood*, 1 Jac. & W. 637.

(*k*) See *Att.-Gen.* v. *Day*, 1 Ves. 221.

(*l*) *Lord* v. *Lord*, 1 Sim. 503, *sed quære.*

(*m*) *Templer* v. *Sweet*, 3 Beav. 464; Lord Langdale's private opinion seems to have been that the heir should be served.

(*n*) *Hodder* v. *Ruffin*, Taml. 341.

(*o*) *Holroyd* v. *Wyatt*, 2 Coll. 329.

(*p*) *Re Goodwin's Settled Estates*, 4 Giff. 90; 8 Jur. N. S. 1173.

(*q*) *Bridger* v. *Penfold*, 1 K. & J. 28.

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might, before the recent Statute (*r*), have lost his bargain by the Court opening, (as it is termed,) the biddings; that is, directing a re-sale, on the application of a person willing to give a higher price for the property; and this, although he were interested in the proceeds of sale (*s*), or were present at the sale (*t*): but, in the last case, the Court regarded the application with some jealousy, and required a larger advance than under ordinary circumstances (*u*): and they might be opened a second time (*x*) on the application of the same person (*y*): but could not be opened until the certificate had been filed (*z*). And the Court had the same power to open biddings upon a sale by sealed tender, as on a sale by public auction (*a*); but the practice was not extended to a sale strictly by private contract (*b*); not even in a case where trustees sold under a power, for a lower price than they might have obtained under a more spirited competition (*c*).

On what advance in price.

The sufficiency of the advance was considered with reference to the entire purchase-money: including the price of timber, although valued separately from the estate (*d*). As to what constituted sufficiency, there was no definite rule; but about ten *per cent.* appears to have been the usual advance on small sums (*e*). The Court would not accept an insufficient advance on the ground of the applicant having mistaken the time of sale (*f*).

(*r*) 30 & 31 Vict. c. 48, s. 7, and *vide infrà.*

(*s*) *Hooper* v. *Goodwin*, G. Coop. 95.

(*t*) *Thornhill* v. *Thornhill*, 2 Jac. & W. 347; overruling earlier cases there cited; see Sug. 118, n.

(*u*) *Tyndale* v. *Warre*, Jac. 525, 526; *Lefroy* v. *Lefroy*, 2 Russ. 606; *Shallcross* v. *Hibberson*, 1 C. P. C., N. R. 380; as to what constituted an advance in price, see *Re Carew's Estate*, 26 Beav. 187.

(*x*) *Scott* v. *Nesbit*, 3 Bro. C. C. 475; *Walond* v. *Walond*, 8 Beav. 352.

(*y*) *Preston* v. *Barker*, 16 Ves. 140; Sug. 115.

(*z*) *Lovegrove* v. *Cooper*, 9 Ha. 279.

(*a*) *Osborne* v. *Foreman*, 2 Jur. N. S. 361; affd. *sub nomine Barlow* v. *Osborne*, 6 H. L. Ca. 556; *Waterhouse* v. *Wilkinson*, 1 H. & M. 636.

(*b*) *Millican* v. *Vanderplank*, 11 Ha. 136.

(*c*) *Harper* v. *Hayes*, 2 De G. F. & Jo. 542.

(*d*) *Bates* v. *Bonnor*, 6 Sim. 380.

(*e*) See Sug. 115; Dan. Ch. Pr. 1198; and 2 Coll. 537.

(*f*) *Anon.*, 1 Ves. jun. 458.

Case of several lots bought by same purchaser.

Where several lots were purchased by the same person, and the biddings were opened as to any of them, he might give up those which he subsequently purchased, on satisfying the Court that he bought them in consequence of having purchased the prior lot (*g*): and a like indulgence would probably have been granted if, the biddings in respect of a subsequent lot being opened, he could satisfy the Court that he bought the prior lot with a view of purchasing such subsequent lot (*h*): and a person seeking to open biddings on some only out of several lots bought by the same purchaser, would therefore be required to take such other lots at their original price, if the purchaser declined them, and they did not fetch so much on a re-sale (*i*).

Mode of opening biddings.

The person wishing to open a bidding on any of the grounds on which biddings may be still opened must, at his own expense, apply for leave, by motion; notice of which must be given to the parties in the cause, and to the purchaser (*k*), but not to the heir of a purchaser dying before the certificate of sale becomes absolute (*l*): he cannot in one motion include lots sold to separate purchasers (*m*). If, under the late practice of opening biddings on the mere ground of an advance in price, his offer were accepted, the order was, in general, made on condition that he paid, as a deposit, the amount of his advance (*n*); and this he had to do at his own expense (*o*): however, in one case, where an advance of 7,000*l.* was offered upon 27,000*l.*, Lord Langdale allowed the biddings to be opened on payment into Court of only 3,400*l.* (*p*); and it was held in a modern case that he could not, pending the re-sale, be required to pay into Court

Deposit required.

(*g*) *Price* v. *Price*, and *Fielder* v. *Fielder*, 1 Sim. & St. 386; see, as to Ireland, *Gregg* v. *Glover*, 1 Ir. Eq. 211.

(*h*) See Sug. 116; *Bowyer* v. *Blackwall*, 3 Anst. 657; *Ex parte Tilsley*, 4 Madd. 227, n.; *et vide suprà*, p. 1076, as to connecting lots.

(*i*) *Bates* v. *Bonnor*, 6 Sim. 380.

(*k*) Dan. Ch. Pr. 1202.

(*l*) *Templer* v. *Sweet*, 8 Beav. 464.

(*m*) *Goodall* v. *Pickford*, 6 Sim. 379. In *Humphries* v. *Roberts*, 6 Jur. 680, the nine lots appear to have been bought by the same purchaser; see Registrar's Minute Book, Trin. T. 1842, fol. 258, where the case is entered as *Jones* v. *Williams*.

(*n*) See *Anon.*, 6 Ves. 513.

(*o*) Sug. 114.

(*p*) *Manners* v. *Furze*, 17 L. J., N. S., Ch. 485, R.

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First purchaser to be paid interest and costs.

the amount of the original deposit (*q*). He was also required to pay to the first purchaser interest, at four *per cent*, on such part of his purchase-money as might have lain dead (*r*); and his costs, including any costs which he himself paid on opening former biddings (*s*); and also, it would seem, (although no special directions would in general be given (*t*),) his or his agent's costs of a journey to the estate (*u*): and where property, which had been sold in several lots, was directed to be resold in a single lot, the Court, under the special circumstances, directed that the person opening the biddings should pay to the purchasers their expenses of surveying the estate (*x*): but the purchaser's costs of investigating the title have been refused (*y*): and it is conceived properly so, as they were prematurely incurred.

Biddings might be re opened on neglect to pay in deposit.

If the person obtaining the order neglected to draw it up and pay the deposit, any other person might, upon notice to him, move to open the biddings (*z*).

Re-sale.

The order being obtained and drawn up, and the deposit paid, the estate would then be resold; the proceedings on the resale being similar to those on the original sale It appears doubtful whether the estate could be re-allotted without a special order, made on special reasons (*a*).

First purchaser discharged by order opening biddings.

The first purchaser was entirely discharged by the order opening the biddings (*b*).

Person opening biddings if outbid at re-sale was *primâ facie* discharged.

If, upon a re-sale, the person opening the biddings were outbid, he was, in the absence of any special agreement with the Court (*c*), discharged from his offer (*d*); and might

(*q*) *Banks* v *Banks*, 16 Beav. 380.

(*r*) *Re Birch*, Sug 115 as to deposit, *Banks* v *Banks*, 16 Beav. 380.

(*s*) *Bates* v. *Bonnor*, 6 Sim. 382

(*t*) See *Anon.*, 2 Ves jun. 286.

(*u*) *S. C.*; and see note to *Farlow* v. *Wieldon*, 4 Madd. 461.

(*x*) *Watts* v. *Martin*, 4 Bro. C. C. 113, Belt's edition.

(*y*) *Sullivan* v. *Bayly*, Fl. & K. 460.

(*z*) *Gibbons* v. *Howell*, 4 Madd. 52.

(*a*) *Ward* v. *Cooke*, 9 Sim. 87; and see *Humphries* v. *Roberts*, 6 Jur. 680, *suprà*, p. 1201.

(*b*) See Dan. Ch. Pr. 1204.

(*c*) See *Walond* v. *Walond*, 8 Beav. 352.

(*d*) See *S. C.*, and *Williams* v. *Attenborough*, Turn. & R. 77.

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reclaim his deposit, but without costs (*e*); although the price of the estate had been more than doubled by the re-sale (*f*): but such costs (*g*), and also interest at 4*l.* *per cent.* on the deposit (*h*), have been allowed where the biddings were opened merely for the benefit of the parties interested in the proceeds of the estate.

When entitled to costs.

A person opening biddings in a fictitious name, would be compelled to take the estate at the price at which he opened them (*i*); if, on a re-sale, no better offer were made and could be enforced (*k*).

Opening biddings in fictitious name.

The practice of opening biddings after a contract had been entered into, which, in any ordinary case, would have been treated as binding on both parties, was frequently productive of serious mischief and inconvenience: but, though reluctantly sanctioned by eminent judges (*l*), was too deeply rooted in the procedure of the Court to be eradicated, except by the aid of the legislature. Now, by a recent statute, the practice has been discontinued; and the highest *bonâ fide* bidder at any sale by auction under the decree of the Court, provided he shall have bid a sum equal to or higher than the reserved price (if any), is to be declared and allowed the purchaser; unless the Court or Judge shall, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land, either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and direct a re-sale; but any such application must be made to

Practice abolished except in what cases.

(*e*) *Rigby* v. *M'Namara*, 6 Ves. 466; *Trefusis* v. *Clinton*, 1 Ves. & B. 361; *Chester* v. *Gorges*, 2 Moll. 505.

(*f*) *Earl Macclesfield* v. *Blake*, 8 Ves. 214.

(*g*) *S. C.*; *Owen* v. *Foulks*, 9 Ves. 348; *West* v. *Vincent*, 12 Ves. 6; *Chapman* v. *Fowler*, 3 Ha. 577.

(*h*) *Filder* v. *Bellingham*, 1 Coll. 526; *Gravenor* v. *Miles*, 8 Jur. 838, V.-C. K. B.; see *Chester* v *Gorges*, *ubi suprà*, *Banks* v. *Banks*, 16 Dre. 380.

(*i*) *Molesworth* v. *Opie*, 1 Dick, 289.

(*k*) Sug. 118.

(*l*) See Lord Eldon's remarks in *White* v. *Wilson*, 14 Ves. 151, 153; and Lord Redesdale's in *Fergus, Executors of*, v. *Gore*, 1 Sch. & Lef. 350.

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the Court or Judge before the chief clerk's certificate of the result of the sale shall have become binding (*m*).

Section 3.

(3.) *As to the certificate of sale becoming absolute;—and as to the purchaser's rights and liabilities thereafter.*

As to certificate of sale, &c.

How certificate of sale becomes absolute.

When the certificate by the chief clerk of the result of the sale has been settled and adopted, and signed by the Judge, the same is filed, and becomes binding on all the parties to the proceedings, unless discharged or varied upon an application for that purpose made within eight clear days after the same is filed (*n*).

Purchaser henceforth *primâ facie* entitled to estate subject to payment of price.

Upon the certificate thus becoming absolute, the purchaser becomes the owner of the estate, subject to payment of the purchase money; and is not liable to have the biddings opened on the mere ground of advance in price (*o*), or of negligence, surprise, &c., on the part of the vendors (*p*), or of mistake on the part of an intended bidder (*q*); but only on special grounds, such as fraud or misconduct in the purchaser, or his fiduciary character, or some fraudulent negligence in another person,—*e.g.*, the agent for sale,—of which it is against conscience that the purchaser should take advantage (*r*). In a modern case, where, on a sale under the direction of the Court, two persons agreed not to bid against each other, but that one should bid up to a stated sum, which, though they did not know it, was in excess of the reserved price, and that the property should be divided between them, it was held that this was not a sufficient

(*m*) 30 & 31 Vict. c. 48, s. 7. As to what amounts to fraud or improper conduct in the management of the sale, see *Delves* v. *Delves*, L. R. 20 Eq. 77.

(*n*) Cons. Ord. XXXV., r. 52; Morgan, p. 560; and see 15 & 16 Vict. c. 80, s. 34.

(*o*) *Morice* v. *Bishop of Durham*, 11 Ves. 57; *White* v. *Wilson*, 14 Ves. 151; *Fergus, Executors of*, v. *Gore*, 1 Sch. & L. 350; *Ware* v. *Watson*, 25 L. J., Ch. 199; 7 De G. M. & G. 739; and see now 30 & 31 Vict. c. 48, s. 7.

(*p*) See 14 Ves. 153.

(*q*) *Anon.*, 1 Ves. jun. 453.

(*r*) See *Morice* v. *Bishop of Durham*, 11 Ves. 57; and, as to fraud, see *Ryder* v. *Earl Gower*, 6 Bro. P. C. 306; and see *Watson* v. *Birch*, 2 Ves. J. 52, 55, where the owner of the estate was in prison at the time of sale.

reason on the ground of fraud for opening the biddings after the sale had been confirmed (s). When the certificate has become absolute, the purchaser may resell at a profit for his own benefit (t). He is also liable to any loss which may happen in connection with the estate; as, in a modern case, the expenses of making good, damages caused to adjoining property by the fall of the houses which he had purchased (u); but he may, it seems, be discharged by the improper conduct of the vendors; as *e.g.*, by their neglect to insure leaseholds pursuant to their covenant (x).

May move to pay in purchase money, or to discharge incumbrances.

He may apply by summons for leave to pay his purchase money into the Bank, and to be let into possession; or, if incumbrances appear by the certificate, or (*semble*) if, although not so appearing, the same are known to exist, and all parties to the suit are *sui juris* and agree to their discharge, for leave to pay them off out of the purchase-money, and to pay in the balance (y): the payment, however, must be an entire payment, although the lot be sold to joint purchasers (z). The conditions usually provide that the purchaser may deduct property tax from any interest payable by him on his purchase-money (a): where this is not the case, the interest must be paid in full without deducting the tax (b); but the purchaser may, it seems, apply for repayment when the purchase-money is dealt with by the Court (c). If the money is invested at the vendors' request, the purchaser will not be affected by any variation in the funds (d); nor will he, in the absence of any improper delay on his part, have to bear any extraordinary expense

(s) *Re Carew's Estate*, 26 Beav. 187.

(t) *Dewell* v. *Tuffnell*, 1 Kay & J. 324; and compare *Goodwin's Settled Estate*, 4 Giff. 90.

(u) *Robertson* v. *Skelton*, 12 Beav. 260.

(x) *Palmer* v. *Goren*, 4 W. R. 688, V.-C. K.

(y) Dan. Ch. Pr. 1191, *et seq.*

(z) *Darkin* v. *Marye*, 1 Anst. 22.

(a) See Regul. 8 Aug. 1857, sched. 7; Morgan App. lxvi.

(b) *Holroyd* v. *Wyatt*, 1 De G. & S. 125; *Dawson* v. *Dawson*, 11 Jur. 984, V.-C. S.; *Humble* v. *Humble*, 12 Beav. 43.

(c) *Bebb* v. *Bunny*, 1 K. & Jo. 216; and see *Duval* v. *Mount*, there cited.

(d) *Ambrose* v. *Ambrose*, 1 Cox, 194; *D'Oyley* v. *Countess Powis*, *ib.* 206; *Gell* v. *Watson*, 2 Sim. & S. 402; *Humphries* v. *Horne*, 3 Ha. 276, 279.

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necessary to complete the conveyance, as *e.g.*, the fine in the admittance of the heir of a vendor who has died since the contract was entered into but before completion of the sale (*e*).

Substitution of purchaser allowed, on what terms.

The Court will, either before or after the certificate of sale has become absolute, discharge the purchaser and substitute any other person (*f*), upon his paying in the entire purchase-money; and such an order has been made under the old practice, where the first purchaser, after confirmation of the report, had agreed in writing to sell the property, and had since died, and his heir was abroad (*g*); and, where the same motion asks for such substitution and for leave to pay in the money and be let into possession, since no additional costs are incurred by the parties to the cause than would have been incurred on the usual motion to pay in purchase-money, no costs will be given (*h*). If the application is made before the certificate of sale has become absolute there must be an affidavit that there is no underbargain (*i*): but such affidavit is unnecessary after the certificate has become absolute, as the purchaser has thereby become the absolute owner.

Where a purchaser died after confirmation, the Court ordered the estate to be conveyed to his devisee, although the heir was an infant (*k*).

Section 4.

As to the investigation of the title, &c.

(4.) *As to the investigation of the title;—payment and application of purchase-money;—possession;—and preparation and execution of the conveyance.*

Abstract—and title.

Delivery of the abstract may, if necessary, be compelled by an order obtained on summons (*l*): and, if dissatisfied with the title shown thereby, the purchaser may procure an

(*e*) *Paramore* v. *Greenslade*, 1 Sm. & G. 541.

(*f*) *Miller* v. *Smith*, 6 Ha. 609.

(*g*) *Pearse* v. *Pearse*, 7 Sim. 138.

(*h*) *Christian* v. *Chambers*, 4 Ha. 307. For form of order, see Seton, 1207.

(*i*) *Rigby* v. *Macnamara*, 6 Ves. 515; *Vale* v. *Davenport*, 6 Ves. 615; see *Dewell* v. *Tuffnell*, 1 K. & Jo. 324; see too *Goodwin's Settled Estate*, 4 Giff. 90; and *supra*, p. 1173.

(*k*) *Rex* v. *Gregory*, 4 Pri. 380.

(*l*) Dan. Ch. Pr. 1178.

order that the title be referred to chambers; upon which reference the proceedings will be similar to those in a suit for specific performance (*m*). When a decree is manifestly wrong by reason of the absence of a necessary party to the record, the purchaser is entitled to be discharged without a reference; but not where the question, whether all proper persons were parties, depends on extraneous circumstances which should be the subject for inquiry (*n*). Contrary to the rule which prevails in ordinary sales, the Court will compel the purchaser to take an equitable title (*o*); but only where the legal estate is outstanding without any claim of interest on the part of the person in whom it is vested (*p*); or is outstanding in an infant from whom it may be readily got in (*q*); and the rule is strictly confined to such cases (*r*): nor will it compel him to take a doubtful equitable title (*s*); nor, perhaps, where there is material error in the decree, to wait until the same is rectified (*t*). So, where the recitals in one of the abstracted deeds were so framed as to conceal a defect in the prior title, the purchaser was discharged from the purchase and was allowed his costs, notwithstanding that by the conditions he was precluded from inquiring into the prior title, and the recitals were made conclusive evidence (*u*). In one case, where a purchaser had accepted the title and paid in his purchase-money, he was discharged from the contract upon a deed being discovered which showed that the plaintiffs could not make a title to more than a moiety of the estate (*x*): but a purchaser, who, having discovered a supposed defect in the title, buys in the interest of the party who alone could take advantage of it, will not

(*m*) *Ibid.* 1180, 1193.

(*n*) *Whitfield* v. *Lequestre*, 3 De G. & S. 364, 367.

(*o*) 14 Sim. 312; and see Sug. 397.

(*p*) *Craddock* v. *Piper*, 14 Sim., see p. 312; and see 3 Ves. 23; but see *Freeland* v. *Pearson*, L. R. 7 Eq. 246.

(*q*) Sug. 397.

(*r*) See *Freeland* v. *Pearson*, L. R. 7 Eq. 246, 249.

(*s*) *Marlow* v. *Smith*, 2 P. Wms. 201.

(*t*) *Lechmere* v. *Brasier*, 2 Jac. & W. 287; *Whitfield* v. *Lequestre*, 3 De G. & S. 467; but see *Sherwood* v. *Beveridge*, 3 De G. & S. 425; *Calvert* v. *Godfrey*, 6 Beav. 97, 110; *Plumtre* v. *O'Dell*, 4 Ir. Eq. 602.

(*u*) *Else* v. *Else*, L. R. 13 Eq. 196; see an anonymous case before Lord Romilly, cited *suprà*, p. 1198.

(*x*) *Ward* v. *Trathen*, 14 Sim. 82; *S. C.*, 8 Jur. 303.

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be allowed the benefit of the general rule as to doubtful titles (*y*). Where the abstract was erroneous and misled the purchaser's counsel on a material point, and the mistake remained for a time undiscovered owing to the negligence of the solicitor in failing to examine the original will, the purchaser having paid his purchase-money into Court, was allowed to be discharged; but he was not allowed interest on his purchase-money, and he had to pay the costs of all parties, except the person who had the conduct of the sale (*z*). Where the title was rendered bad by the vendor's default to keep the property insured, the purchaser was discharged (*a*).

Costs of reference.

It is stated by Lord St. Leonards (*b*), that, in every case, the purchaser is entitled to the costs of the motion for a reference of title, and to the costs of that reference: it appears, however, from a later case (*c*), that the decision, upon which the above proposition was founded, is misreported: and that the Court only held that the purchaser was not liable to *pay* costs, on the certificate being in favour of the title: if, however, the title were made out, in chambers, on grounds not appearing on the abstract, he would be entitled to receive costs (*d*): and if the title is found to be good upon grounds appearing on the abstract, he may be ordered to pay costs, if his objections are frivolous and vexatious (*e*). If the title prove bad, the purchaser, unless precluded by the conditions, is entitled to receive his costs (*f*), charges, and expenses (*g*), out of the fund in Court

(*y*) *Sheppard* v. *Doolan*, 3 Dru. & W. 1.

(*z*) *McCulloch* v. *Gregory*, 1 Kay & J. 286.

(*a*) *Palmer* v. *Goren*, 4 W. R. 688, V.-C. K.

(*b*) Sug. 107, citing *Camden* v. *Benson*, 1 Ke. 671.

(*c*) *Flower* v. *Hartopp*, 8 Beav. 200; and see *Holland* v. *King*, 20 L. J. 123.

(*d*) *Fieldier* v. *Higginson*, 3 Ves. & B. 142; where the purchase seems to have been made under a decree: see 2 Sim. & St. 117.

(*e*) See Dan. Ch. Pr. 1180; Morgan & Davey, 270, *et seq.*

(*f*) See *Leland* v. *Griffith*, 2 Moll. 150; *Pleasants* v. *Roberts*, *ib.* 507; *Barton* v. *Lord Downes*, Fl. & K. 633; *Weir* v. *Chawley*, 2 Ir. Ch. Rep. 566.

(*g*) See form of Order, *Perkins* v. *Ede*, 16 Beav. 268; and *Powell* v. *Powell*, L. R. 19 Eq. 422, 425.

(if any) (*h*); or, if there be none, from the plaintiff, who may recover them in the suit (*i*): but a defendant, to whom the conduct of the sale has been given, will not, it seems, be ordered to pay the purchaser's costs, where there are funds in Court which may be made primarily answerable: in such a case leave will be given to the purchaser to apply for payment (*k*). It is said to have been held by Sir J. Leach that, where exceptions were allowed to the Master's report in favour of the title, the Court would not thereupon direct that the purchaser be discharged and his costs be paid, but that some specific application must be made for the purpose (*l*): notice of which must have been given to all parties interested in the purchase-money (*m*). It appears that, where the title is decided to be bad, the purchaser must be actually discharged by order, before there can be a re-sale (*n*).

Condition as to discharge of purchaser and return of deposit.

A condition is not unfrequently inserted providing that if the purchaser shall make any valid objection or requisition which the vendors shall be unable to remove or comply with, the purchaser may be discharged by an order of the Judge; and shall thereupon be entitled to a return of his deposit, but not (unless the Judge shall otherwise direct) to any interest, costs, expenses, or damages in respect of his purchase (*o*).

(*h*) *Reynolds* v. *Blake*, 2 Sim. & St. 117; *Att.-Gen.* v. *Corp. of Newark*, 8 Sim. 71; *Calvert* v. *Godfrey*, 6 Beav. 97; *Ward* v. *Trathen*, 14 Sim. 82; *Lachlan* v. *Reynolds*, Kay, 52.

(*i*) *Berry* v. *Johnson*, 2 Y. & C. 564, 565; *Smith* v. *Nelson*, 2 Sim. & St. 557.

(*k*) *Mullins* v. *Hussey*, L. R. 1 Eq. 488, M. R.

(*l*) *Hide* v. *Hide*, 1 C. P. C. N. R. 379; and see *Howell* v. *Kightley*, 4 W. R. 477; 8 De G. M. & G. 325. It appears that on a sale by the Crown under the 25 Geo. III. c. 35, authorizing the sale of the lands of Crown debtors or their sureties, the purchaser gets no costs, if the title prove bad; *Rex* v. *Cracroft*, 1 M'Clel. & Y. 460.

(*m*) *Sherwood* v. *Beveridge*, 3 De G. & S. 425.

(*n*) *Williams* v. *Wace*, 1 C. P. C. N. R. 379.

(*o*) See Dan. Ch. Pr. 1180. As to the effect of such a condition, see *Powell* v. *Powell*, L. R. 19 Eq. 422, where the purchaser was, under the circumstances, held entitled to interest on his deposit, with costs, charges, and expenses; and as to such a condition being a proper one for fiduciary vendors to employ, see *Falkner* v. *Equitable Reversionary Society*, 4 Drew. 352; *suprà*, p. 74.

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Where the sale has taken place under circumstances which, in the case of an ordinary sale, would be a defence to a suit for specific performance, except with a variation, but would not be a ground for rescinding the contract, the Court, as the property must be sold, is obliged to decide whether the sale is to be carried into effect, or the property is to be resold: but, as far as possible, the rules which regulate such cases between ordinary vendors and purchasers will be adapted to purchases under orders of the Court (p).

Purchase-money may, under special circumstances, be paid in without accepting title.

Although the practice has varied (q), it is now clearly the rule of the Court that, on a special case, as where the purchaser is entitled to relieve himself from paying interest, the Court will receive the purchase-money on his application, without his accepting the title (r): but the order will not be made except in a special case (s): nor will it be extended so as to let him into possession (t). The acceptance of the title, subject to a mere reservation of a claim to compensation in case the property should prove not to be tithe free, has, however, been held sufficient (u). Where a purchaser, without the authority of the Court, enters into possession, although with the consent of the vendor's solicitor, he will be held to have accepted the title (x), and will be at once ordered to pay in his purchase-money (y): so, if in possession, without having paid for the estate, he may, on motion, without suit, be restrained from waste (z).

As to its application and distribution.

When the purchase-money is paid into Court, it will not,

(p) *Alvanley* v. *Kinnaird*, 2 Mac. & G. 1, 8.

(q) See Sug. 103; *Denning* v. *Henderson*, 1 De G. & S. 689; and *Rutter* v. *Marriott*, 10 Beav. 33.

(r) *Per* Lord Cottenham in *De Visme* v. *De Visme*, 1 Mac. & G. 344; *Hindle* v. *Dakins*, 1 C. P. C. N. R. 378; *Morris* v. *Bull*, 1 De G. & S. 691, n.; *Rutley* v. *Gill*, 3 De G. & S. 640.

(s) *Ouseley* v. *Anstruther*, 11 Beav. 399.

(t) *Hutton* v. *Mansell*, 2 Beav. 260; *Rutter* v. *Marriott*, 10 Beav. 33; *Dempsey* v. *Dempsey*, 1 De G. & S. 691; Dan. Ch. Pr. 1183.

(u) *Man* v. *Ricketts*, 5 De G. & S. 116.

(x) *Wilding* v. *Andrews*, 1 C. P. C. N. R. 380.

(y) *S. C.*; and see *Anon.*, cited Sug. 105.

(z) *Cassamajor* v. *Strode*, 1 Sim. & S. 381.

without the purchaser's consent, be applied in discharge of incumbrances, on the ground of his delay in preparing the draft conveyance (*a*): it is, however, usual, upon paying in the money, expressly to ask that it may not be paid out again without notice to the purchaser; an order to which effect prevents the distribution of the fund without the purchaser's consent given in Court, or upon his non-appearance and an affidavit of his having been served with a copy of the order for setting down the cause for further consideration, or of the petition for distribution. Where, however, a purchaser accepted the title, with knowledge of an incumbrance, and paid his purchase-money into Court, it was held that he had no lien upon it in respect of the incumbrance (*b*). In one case, where the fund was small, the Court inserted in the order for sale a special direction that the proceeds of sale should be distributed upon the chief clerk's certificate; but that before distribution the purchasers should be served with a summons to show cause why the money should not be so distributed (*c*). In another case, Lord Langdale appears to have held that, although the estate was sold for payment of debts, the Court ought not to distribute the fund until an effectual conveyance could be made to the purchaser (*d*). In an early case, where the title had been accepted and the conveyances executed, the purchaser was unable to prevent the distribution of the fund, although an adverse claim had been made to the estate (*e*). He is not in any way responsible for its application; for by payment into Court he has discharged the only condition incumbent upon him (*f*).

Is legal assets.

The purchase-money of real estate paid into Court in a creditor's suit, has been held to be legal assets (*g*); and

(*a*) *Bevan* v. *Bevan*, 1 C. P. C. N. R. 381.

(*b*) *Miller* v. *Pridden*, 8 Jur. N. S. 78.

(*c*) *Thorp* v. *Owen*, 2 Sm. & Gif. App. 1.

(*d*) *Heming* v. *Archer*, 9 Beav. 366; see and consider *Morris* v. *Clarkson*, 3 Sw. 558, and other cases cited in reporter's note, *et quære*.

(*e*) *Thomas* v. *Powell*, 2 Cox, 394.

(*f*) *Todd* v. *Studholme*, 3 K. & Jo. 324, 338.

(*g*) *Lovegrove* v. *Cooper*, 2 Sm. & Gif. 271; as to whether it is subject to the legacy duty, *vide suprà*, p. 275.

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where it proves insufficient for the payment in full of the debts and there is no personalty, it has been held that it ought to be applied, first in payment of the costs of the plaintiff and the defendants, who are beneficially entitled, *pari passu* as between party and party, then in payment of the plaintiff's extra costs as between solicitor and client, and then towards satisfaction of the debts (*h*): but, as a general rule, where there is personal estate to be administered, and the assets prove insufficient for the payment of debts in full, the legal personal representative is entitled to payment of his costs, charges, and expenses in priority to the plaintiff's costs of sale of the real and leasehold estate (*i*).

Application of, where estate is incumbered.

We may here observe that an incumbrancer consenting to a sale in a legatee's administration suit, is entitled to be paid his principal, interest, and costs, out of the purchase-money, in priority to the costs of the plaintiff in the cause (*k*); but in a creditor's suit, it has been held that he is only entitled to have his costs of the actual sale paid out of the proceeds, leaving his other costs and expenses to be borne by the general assets (*l*). He may put a stop order on the fund (*m*); but, even if he omit to do so the plaintiff may be made responsible, if he permit the purchase-money to be paid out of Court without satisfying the incumbrance (*n*). As a general rule, a decree for sale of an encumbered estate does not, of itself, alter the rights of the parties: so that where estates subject to numerous and complicated incumbrances were sold, by consent, it was held that to authorize payment of the costs of sale in the first place out of the general fund there should have been a special direction in the decree; and that, there being no such direction, the money arising from the sale of each estate ought to be

(*h*) *Henderson* v. *Dodds*, L. R. 2 Eq. 532.

(*i*) *Spensley's Estate*, L. R. 15 Eq. 16, administration suit by a mortgagee; and see *Wetenhall* v. *Dennis*, 33 Beav. 285, administration suit by a legatee.

(*k*) *Hepworth* v. *Heslop*, 3 Ha. 485; and see *Tipping* v. *Power*, 1 Ha. 405.

(*l*) *Berry* v. *Hebblethwaite*, 4 K. & Jo. 80.

(*m*) *Todd* v. *Studholme*, *ubi suprà.*

(*n*) *Ibid.*

treated as the estate itself would have been; and that the mortgagees ought to be paid their principal, interest, and costs according to their respective priorities (*o*): so where a devisee in trust for sale is himself a creditor of the testator, his right to retain his own debt out of the proceeds of sale is not prejudiced by their payment into Court (*p*); and the ultimate surplus of the proceeds of sale belongs to the heir or devisee (*q*). If a mortgagee institutes a suit for the administration of the estate of his deceased mortgagor, his costs are those of a plaintiff in an ordinary administration suit (*r*); and where a first mortgagee with power of sale unnecessarily files a bill praying a sale, subsequent incumbrancers, although they consent to the sale, are entitled to their costs out of the purchase-money, although it be insufficient to pay off the first charge (*s*). A mortgagee, in an administration suit, has no specific claim on the proceeds of sale paid into the general credit of the estate, so as to entitle him to the accumulations (*t*).

Purchaser should require the deeds to be handed over.

Purchasers on taking a conveyance should be careful that the deeds are not improperly left in the possession of the releasing incumbrancer. Where such is the case, although they may not be postponed to him in the event of the money not reaching his hands, his bill against them may be dismissed without costs, unless they have a covenant for the production of the deeds (*u*).

Purchaser's costs of appearing on petition for its distribution, when allowed.

If the purchaser, before completion, is served with a petition or notice of motion for payment of the purchase-money out of Court, he is entitled to his costs of appearing on the application, although he make no opposition (*x*); but such costs will (as a general rule) be disallowed if he

(*o*) *Wild* v. *Lockhart*, 10 Beav. 320; and see *Aldridge* v. *Westbrook*, 5 Beav. 188; and *Hall* v. *Macdonald*, 14 Sim. 1; *Crosse* v. *Rev. Socy.*, 3 De G. M. & G. 698.

(*p*) *Hall* v. *Macdonald*, 14 Sim. 1.

(*q*) *Cooke* v. *Dealey*, 22 Beav. 196.

(*r*) *Wright* v. *Kirby*, 23 Beav. 463; and see *Re Spensley's Estate*, L. R. 15 Eq. 16.

(*s*) *Cooke* v. *Brown*, 4 Y. & C. 227.

(*t*) *Irby* v. *Irby*, 22 Beav. 217.

(*u*) See *Todd* v. *Studholme*, 3 K. & J. 324, 338, 339.

(*x*) *Bamford* v. *Watts*, 2 Beav. 201.

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appear after the conveyance is executed: in such a case his proper course is merely to inform the petitioners that he has no claim on the fund (y). Under special circumstances, however, he may, after conveyance, be allowed his costs of such appearance (z).

If invested at purchaser's request, he takes proceeds of investment, if contract rescinded.

If the money has been invested on his application, he must, if the purchase is rescinded, take the stock, notwithstanding any variation in the funds (a): but when, in a foreclosure suit, the estate is sold by consent, and the purchase-money invested in Consols, pending an enquiry as to the amount due on the security, the mortgagee is not prejudiced by a fall in Consols; and, if the ultimate proceeds are insufficient, may claim the deficiency in an administration suit (b).

Possession—from what time purchaser entitled to.

Where the conditions of sale are silent as to the time when he is to have possession, and as to interest upon the purchase-money, the rule of the Court is, that he shall be let into possession from the quarter-day preceding the time when the chief clerk's certificate of his being the purchaser becomes absolute, he paying his purchase-money into Court before the following quarter-day (c): and although he may not pay his purchase-money into Court until the quarter is nearly expired, yet he will not be liable to pay interest (d), unless the estate be a reversion, or a life annuity payable quarterly (e); in which case interest is payable from the date of the purchase (f). If he delay payment, he will take the rent only from the quarter-day preceding payment (g): nor will he be allowed the rents from an earlier day on the

(y) *Barton* v. *Latour*, 18 Beav. 526.

(z) *Strong* v. *Strong*, 4 Jur. N. S. 943; *Noble* v. *Stow*, 30 Beav. 272.

(a) *Hodder* v. *Ruffin*, cited Sug. 119; *suprà*, p. 1207.

(b) *Tompsett or Bridger* v. *Wickens*, 2 Jur. N. S. 10; 3 Sm. & G. 171.

(c) See *Twigg* v. *Fifield*, 13 Ves. 518; *Gowan* v. *Tighe*, 1 Rep. t. Pl. 168, 176; but see, as to Ireland, *Prendergast* v. *Eyre*, 1 Rep. t. Pl. 180; *Maurice* v. *Wainewright*, C. P. C. N. R. 378.

(d) *S. C.*

(e) As to which, *vide infrà*.

(f) *Trefusis* v. *Lord Clinton*, 2 Sim. 359; *suprà*, p. 630; see, as to the practice in Ireland, *Hutchinson* v. *Cathcart*, 1 Jo. & C. 260.

(g) Sug. 104.

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ground of his money having lain idle (h). Where, as in the case of a colliery, the profits are ascertained monthly or weekly, he will be entitled to them from the commencement of the month or week (as the case may be) in which he pays his money (i); and the same principle would, it is conceived, prevail where, as often happens with house property, the rents are paid at shorter intervals than a quarter: while, on the other hand, if rents are reserved half-yearly, the purchaser would seem, on principle, to be entitled to them from the commencement of the current half, instead of quarter, year; and this has been so decided (k): on the purchase of a manor, fines on descent are, for the purpose of the above rules, considered to accrue due on the death of the copyholder, and not on the admission of his heir or devisee (l).

Where an offer was made, out of Court, to purchase a deteriorating property (leaseholds), and the Court, upon the Master reporting in favour of the sale, accepted the offer, the purchaser was held entitled to the rents from the date of the order of reference (m).

On purchase of life interest or life annuity.

On the purchase of a life interest in stock, the purchaser pays interest and takes the dividends from the day of sale (n); on the purchase of a life annuity, secured by bond and payable quarterly, he must pay interest and take the annuity from, it is conceived, the day on which the chief clerk's certificate of the sale became absolute (o).

As to abstract, &c.

The remarks already made (p) as to the abstract, searches

(h) *Ibid.*; *Barker* v. *Harper*, G. Coop. 32; *Hindle* v. *Dakins*, 1 C. P. C. N. R. 378. As to the case of a mortgagee, see *Bates* v. *Bonnor*, 7 Sim. 427.

(i) *Wren* v. *Kirton*, 8 Ves. 502; *Williams* v. *Attenborough*, Turn. & R. 73.

(k) *Hughes* v. *Wells*, V.-C. Wood, 1 Dav. Conv. 513, 2nd ed.

(l) *Garrick* v. *Lord Camden*, 2 Cox, 231; the marginal note is incorrect; it will be seen from the case that the admissions were *after* and not *before* the time fixed for completion: see *Earl Hardwicke* v. *Lord Sandys*, 12 M. & W. 761; *Cuddon* v. *Tite*, 1 Giff. 395.

(m) *Cheetham* v. *Sturtevant*, 3 De G. & S. 468.

(n) *Anson* v. *Towgood*, 1 Jac. & W. 637.

(o) See *Twigg* v. *Fifield*, 13 Ves. 517.

(p) *Suprà*, Chaps. VIII., X., XI.

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for incumbrances, and matters arising between its delivery and the preparation of the conveyance, are generally applicable as well to sales by the Court as to ordinary sales.

Conveyance—when to be settled in Chambers.

The conveyance, if an infant be a necessary conveying party (*q*), or if, although he be not a party, it will by statute have the effect of divesting his estate (*r*), must as a general rule, be settled by the Judge at Chambers (*s*): and this is always required, where the estate is sold under the provisions of the Leases and Sales of Settled Estates Act (*t*). Subject to this exception, it is usual to direct only that the draft be settled by the Judge "in case the parties differ;" and when the order is so worded, a purchaser going before the Judge pays his own costs, unless he can make out special grounds for exemption (*u*); the practice at Chambers is similar to that in a suit for specific performance (*x*). Where the estate belongs to an infant, the order for conveyance should be distinct from and should recite the order for payment of the purchase-money into Court (*y*).

Executor of lessee entitled to indemnity from purchaser of leaseholds.

Upon the sale by the Court of leaseholds of a testator his executor, although he have not been in possession, is entitled to an indemnity against the rent and covenants (*z*), by the covenant of the purchaser, and also by a retainer of part of the assets, or by a security from the legatees to refund (*a*). And it would seem that a sum which had been set apart to

(*q*) *Calvert* v. *Godfrey*, 2 Beav. 267.

(*r*) *Cheese* v. *Cheese*, 15 L. J. N. S. 28, V.-C. S.; *aliter*, if the infant be only interested in the proceeds of sale (*Richardson* v. *Ward*, 11 Beav. 378): the consequent costs must be borne by the funds in Court: *Brown* v. *Lake*, 15 L. J. N. S. 34, V.-C. K. B.

(*s*) But see as to leases, *Day* v. *Croft*, 14 Beav. 219. As to leases under the Settled Estates Act, no form of lease need now be settled in Chambers except in special cases, *Re Doring's Settled Estates*, 14 W. R. 125; and see now sects. 1 and 2 of the Amendment Act, 27 & 28 Vict. c. 48.

(*t*) *Re Eyre*, 4 K. & J. 268; Dan. Ch. Pr. 1186; see, however, Dav. Conv. 2, p. 216, 2nd ed.; Seton, 1197.

(*u*) *Hodgson* v. *Shaw*, 11 Jur. 95, V.-C. K. B.

(*x*) *Vide suprà*, p. 1098.

(*y*) *Harvey* v. *Brooke*, 17 Jur. 1.

(*z*) *Cochrane* v. *Robinson*, 11 Sim. 378; see, too, *Garratt* v. *Lancefield*, 2 Jur. N. S. 177; *Dean* v. *Allen*, 20 Beav. 1; *Brewer* v. *Pocock*, 23 Beav. 310; *Waller* v. *Barrett*, 24 Beav. 413.

(*a*) *Dobson* v. *Carpenter*, 12 Beav. 370; *Smith* v. *Smith*, 2 Eq. R. 727.

answer such liabilities will not be paid out without notice to the landlord (*b*).

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Purchaser may require concurrence of all necessary parties.

The purchaser may require the concurrence of all persons having a legal title to, or remedy against, the property, although parties to the suit (*c*); except, perhaps, a dowress, whose dower is barred by a term or equitable jointure (*d*); or a person who claims in respect of an estate held merely in trust, or by way of mortgage (*e*); as also of equitable claimants or incumbrancers who are not parties to the suit (*f*): but cannot, it would seem, "if he acquire the legal estate, require at the seller's expense, a release from equitable incumbrancers whose demands have been satisfied by the Court" (*g*): nor does it, in fact, appear, that he can insist on the concurrence, even at his own expense, of parties having mere equitable interests and who are bound by the decree (*h*); and the Court has refused to make, under the Trustee Act, an order purporting to vest such an interest in the purchaser (*i*). Any right of the purchaser to require the concurrence of such parties is very commonly expressly negatived by condition. If the decree direct that all proper parties convey, and a party to the suit, or creditor coming in under the decree (*k*), whom the Judge considers a proper party to the conveyance, refuses to concur, the purchaser's application should be against the recusant party (and not against the plaintiffs) that he do convey (*l*). It appears that

Who are such.

Party refusing may be ordered to convey.

(*b*) *Bunting* v. *Marriott*, 7 Jur. N. S. 565; but see *King* v. *Malcott*, 9 Ha. 692.

(*c*) See and consider *Craddock* v. *Piper*, 14 Sim. 310.

(*d*) *Vide suprà*, pp. 513, 514.

(*e*) *Suprà*, p. 514.

(*f*) *Piers* v. *Piers*, 1 Dru. & Wal. 265; *Rolleston* v. *Morton*, 1 Dru. & W. 171, 177; *Grey Coat Hospital* v. *Westminster Improvement Commissioners*, 1 De G. & J. 531; and see *Knight* v. *Pocock*, 24 Beav. 436.

(*g*) Sug. 107, citing *Keatinge* v. *Keatinge*, 6 Ir. Eq. 43; and *Webber* v. *Jones*, *ib.* 142.

(*h*) *Webber* v. *Jones*, *ubi suprà*; and see *Cole* v. *Sewell*, 17 Sim. 40.

(*i*) *Re Williams' Estate*, 5 De G. & S. 515; but see *Lechmere* v. *Clamp*, 31 Beav. 578, where a mortgagor who could not be found was declared to be a trustee, and a vesting order made.

(*k*) See *Usher* v. *Scanlan*, Fl. & K. 243. A direction that the vendor shall convey is tantamount to a direction that he and all necessary parties shall convey: *Minton* v. *Kirwood*, L. R. 3 Ch. Ap. 614.

(*l*) *Stilwell* or *Stilwell* v. *Mellersh*, 10 Sim. 367; 4 Myl. & C. 581.

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a mortgagee, who has proved his debt, may be required to receive his money and to concur without the usual six months' notice (*m*); but in a modern case, Lord Romilly stated the rule to be that a mortgagee consenting to a sale is entitled to six months' interest from the date of his consent, if paid within that period; but if paid afterwards, then interest down to the time of actual payment (*n*). Where the conveyance to the purchaser depended in some measure upon a resettlement, which was impeached by annuitants who were parties to the suit, they were ordered to join in the conveyance without prejudice to their rights against the purchase-money (*o*).

Against whom order will be made.

Such an order will not be made against a married woman in respect of her real estate not settled to her separate use (*p*); but will be made against an infant (*q*); and if he refuse to execute, an attachment may issue against him (*r*).

(*m*) *Matson* v. *Swift*, 5 Jur. 645.

(*n*) *Day* v. *Day*, 31 Beav. 270.

(*o*) *Sullivan* v. *Sullivan*, 28 Beav. 102.

(*p*) *Jordan* v. *Jones*, 2 Ph. 170; but in such a case the married woman may now be declared a trustee, and a vesting order obtained under the Trustee Act.

(*q*) As to conveyances on sales in creditors' suits, see 1 Will. IV. c. 47, ss. 11 and 12, amended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87; and see *Penny* v. *Pretor*, 9 Sim. 135; *Walker* v. *Aston*, 14 Sim. 87; *Heming* v. *Archer*, 8 Jur. 945; 7 Beav. 515; 8 Beav. 294. An infant tenant in tail may be ordered to convey, *Radcliffe* v. *Eccles*, 1 Ke. 130; *Penny* v. *Pretor*, *suprà*; it is doubtful whether a conveyance by a person appointed to convey in place of infant would have the same effect, *Wood* v. *Beetlestone*, 1 K. & J. 213; and see now Trustee Extension Act, 1852, sect. 1. A suit by an equitable mortgagee praying a sale is within the statute; and the infant heir of the mortgagor will be ordered to convey, although the mortgagee is, with the permission of the Court, the purchaser; and although, if the decree had been for foreclosure, the infant would have been allowed to show cause on coming of age; see *Scholefield* v. *Heafield*, 7 Sim. 669; 8 Sim. 470; *Redshaw* v. *Newbold*, 12 Jur. 833, V.-C. K. B.; *Clinton* v. *Bernard*, 1 Dru. 287. A conveyance may still be enforced under the above Acts, but, in practice, recourse is now generally had to the Trustee Act, 1850, see ss. 29 and 30, and *suprà*, cap. xiii. s. 1. On a suit by a registered judgment creditor to realize his security, a tenant in tail in possession may be directed to execute a disentailing assurance: *Lewis* v. *Duncombe*, 20 Beav. 398. *Quære*, whether under the 1 Will. IV. c. 47 and the 3 & 4 Will. IV. c. 104, the Court can sell copyholds: see *Branch* v. *Browne*, 12 Jur. 768, V.-C. K. B.

(*r*) *Thomas* v. *Gwynne*, 8 Beav. 312; and see *Re Beech*, 4 Madd. 128.

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Party refusing may be declared a trustee.

But the more usual course of proceeding, where a party to the suit refuses to execute, has been to treat such party as a trustee within the 1 Will. IV. c. 60, and to obtain an order for some other person to convey under the Act: and this course might have been adopted when the recusant party was a married woman (s), infant (t), lunatic (u), or mere tenant for life (x): and the mere decree directing a sale and all proper parties to convey, made the owner of the legal estate, if party to the suit, a trustee within the Act (y). An order for a conveyance, or a vesting or releasing order having the effect of a conveyance, may now be obtained under the Trustee Acts (z); which may be made so as to limit the estate to the common uses to bar dower (a). Where property was sold in lots to several purchasers, it was held that each purchaser might separately petition for an order vesting the estate of an infant, and that the vendors must pay the costs (b).

As to lunatics, see 16 & 17 Vict. c. 70, s. 192.

Section 5.

(5.) *As to the purchaser's rights after completion.*

As to purchaser's rights after completion.

Upon the execution of the conveyance the purchaser is, as a general rule, entitled to have the title deeds delivered to

(s) *Jordan* v. *Jones*, 2 Ph. 170; *Billing* v. *Webb*, 1 De G. & S. 716; and see *Jumpson* v. *Pitchers*, 1 Coll. 13; *Hood* v. *Hall*, 14 Jur. 127, V.-C. W.

(t) *Walters* v. *Jackson*, 12 Sim. 278; *Warburton* v. *Vaughan*, 4 Y. & C. 247; *Thomas* v. *Gwynne*, 9 Beav. 275.

(u) *In re Blake*, 3 J. & L. 265; and see as to lunatics, 16 & 17 Vict. c. 70, ss. 124, 139.

(x) *In re Milfield*, 2 Ph. 254.

(y) See cases cited in last four notes; and *King* v. *Leach*, 2 Ha. 57; *Robinson* v. *Wood*, 5 Beav. 246; *Jackson* v. *Milfield*, 5 Ha. 538; *In re Blackwell*, 7 Jur. 9, V.-C. S.; *Barfield* v. *Rogers*, 8 Jur. 229, C. As to the application of the Trustee Act, 1850, to cases of partition where an infant is legally interested, see *Bowra* v. *Wright*, 4 De G. & S. 265; *Re Bloomar*, 2 De G. & J. 88.

(z) 13 & 14 Vict. c. 60, ss. 29 and 30; 15 & 16 Vict. c. 55, s. 1; and as to County Palatine of Lancaster, 17 & 18 Vict. c. 82, s. 11. The purchaser is the proper person to make the application, but the plaintiff may join with him. See *Rowley* v. *Adams*, 14 Beav. 130. Several lots may be included in one petition, *S. C.*

(a) *In re Lush's Estate* 5 De G. & S. 436; *Davey* v. *Miller*, 1 Sm. & G. xix. App.; but see *In re Howard's Estate*, 5 De G. & S. 435. And see, as to several cases on the statutes, Dan. Ch. Pr. 1763, *et seq.*; Morgan, 76, *et seq.*

(b) *Ayles* v. *Cox*, 17 Beav. 584; *Bradley* v. *Munton*, 16 Beav. 294.

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Purchaser, after conveyance executed, may claim the deeds.

him; and an order for their delivery, if not provided for in the order for payment of the purchase-money, may be obtained on summons, or (by consent) by a petition of course at the Rolls (c). On a sale in lots, the purchaser of the largest lot is, in the absence of special agreement, entitled to the deeds as against the purchaser of several lots of larger aggregate amount (d); if the purchaser, instead of applying to the Court, bring an action at Law against parties to the suit for a document to which he is entitled, he will be restrained by injunction (e). Where mortgagees, parties to the suit, consented to the sale, they were ordered to leave the deeds in the Master's office, but it was directed that they should not be delivered to the purchaser, without notice to the mortgagees (f). The solicitor conducting the sale is the proper person to apply for the delivery to the purchaser of the deeds deposited in Court (g).

As to attested copies.

The purchaser is also, in the absence of stipulation, entitled to attested copies, and a covenant for the production of the originals of such documents of title as are not delivered to him (h); it may, however, be remarked that, in *Dare* v. *Tucker* (i), Lord Eldon qualified his order for delivery of attested copies by the expression, "unless you leave the originals, or make some other proposal in the Master's office;" so that, possibly, upon a sale by the Court, a deposit of the deeds with the Clerk of Records and Writs might be sufficient to preclude the right to attested copies: but such a deposit could probably not be enforced against a purchaser who had purchased to an amount exceeding that of any other purchaser, and the part (if any) remaining

(c) Dan. Ch. Pr. 1190.

(d) *Kinnaird* v. *Christy*, cited Dan. Ch. Pr. 1190; *Scott* v. *Jackman*, 21 Beav. 110. The conditions ought always to provide that the purchaser of the largest part in *value* of property, held under the common title, shall have the custody of the deeds. As to the right of a vendor who retains any part of the estate to retain the documents of title, see now 37 & 38 Vict. c. 78, s. 2.

(e) *Stubbs* v. *Sargon*, 4 Beav. 90.

(f) *Livesey* v. *Harding*, 1 Beav. 343, 346; *Knott* v. *Cottee*, 27 Beav. 33.

(g) See Dan. Ch. Pr. 1190; Seton, 1062, 1199, 1200.

(h) As to the qualification of this right, *vide suprà*, ch. xii. s. 5.

(i) 6 Ves. 460.

unsold. It is a not uncommon practice in Court sales, after providing by the conditions for the custody of the deeds, to reserve a general power for the vendors to make any other arrangement respecting them which the Judge may approve of.

Purchaser will be protected against all parties to suit.

Where the estate is sold in accordance with the decree, the Court "will protect the purchaser against the parties to the suit (*k*), and all parties coming in under the decree" (*l*); and Lord St. Leonards considers it to be a general rule that, even as against absent parties (*m*), the purchaser shall not lose the benefit of his purchase by any irregularity in the proceedings in a cause (*n*). So, if the Court being authorised by a private Act to ascertain the amount of A.'s debts, and to sell for their payment, sell in a manner authorised by the Act, but under a wrong conclusion as to the amount of the debts, the error will not affect a purchaser (*o*). So, as we have already seen (*p*), where the sale is made under the provisions of the Leases and Sales of Settled Estates Act (*q*), it is not to be invalidated on the ground that the Court was not empowered to authorise the same.

Unless Court exceed its jurisdiction.

If, however, the Court clearly exceed its jurisdiction, as if, in cases not falling within the scope of the Partition Act, 1868, or the Leases and Sales of Settled Estates Act (*r*), it assume to sell the real estate of infants upon the mere notion that a sale is beneficial (*s*), or, as against *cestuis que trust*,

(*k*) Although claiming by title acquired subsequently to the decree; *Massy* v. *Batwell*, 4 Dru. & W. 58, 80.

(*l*) Sug. 111; *Usher* v. *Scanlan*, Fl. & K. 243; *Stacpoole* v. *Curtis*, 2 Moll. 504; *Tommey* v. *White*, 3 H. L. C. 63.

(*m*) Sug. Law of Prop. 682.

(*n*) Sug. 110, and cases cited in the judgment in *Bowen* v. *Evans*, 1 J. & L. 256, *et seq.*; Dan. Ch. Pr. by H. 1201; and see *Baker* v. *Sowter*, 10 Beav. 343; *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. 81; *Keogh* v. *Keogh*, 13 Ir. Eq. 284; *Dixon* v. *Wilkinson*, 1 Eq. R. 556; 22 L. J. 981; and see *Blackie* v. *Clark*, 15 Beav. 606.

(*o*) *Vans Agnew* v. *Stewart*, Sug. 68.

(*p*) *Suprà*, p. 1179.

(*q*) 19 & 20 Vict. c. 120, s. 28.

(*r*) *Vide suprà*, p. 1180.

(*s*) *Calvert* v. *Godfrey*, 6 Beav. 97; *Russel* v. *Russel*, 1 Moll. 525; *Daly* v. *Daly*, 2 J. & L. 758; *Weir* v. *Chamley*, 1 Ir. Ch. R. 317; see *Peto* v. *Gardner*, 2 Y. & C. C. C. 312. See, as to special circumstances warranting a sale, *Garmstone* v. *Gaunt*, 1 Coll.

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not *sui juris*, to anticipate, without special grounds, the time fixed by the author of the trust for the sale of the estate (*t*), it is not clear that the purchaser would be protected by the decree; at any rate, he will not be compelled to accept the title: and a purchaser, especially if he be the plaintiff in the cause (*u*), is always bound to see that the sale is according to the decree (*x*); although he is not bound to see that no more property is sold than will be sufficient for the purposes for which a sale was directed (*y*), nor will he, it would seem, be affected by fraud in the proceedings of which he himself is innocent (*z*), unless it

577; and see *Nunn* v. *Hancock*, L. R. 6 Ch. Ap. 850; and as to cases in which, before the late Partition Act, the Court directed a sale of an estate in which an infant was interested, *vide suprà*, p. 1187, and cases there cited. And see, as to the sale by the Court of charity lands, *Att.-Gen.* v. *Corporation of Newark*, 1 Ha. 395; *Att.-Gen.* v. *South Sea Company*, 4 Beav. 453, and cases cited; *Att.-Gen.* v. *Pilgrim*, 12 Beav. 57, 60; 14 Jur. 1053; it has been doubted whether the Court can direct a sale upon petition under Sir S. Romilly's Act (52 Geo. III. c. 101); see *In re Parke's Charity*, 12 Sim. 329; *In re Newton's Charity*, 12 Jur. 1011; *In re Suir Island Charity*, 3 J. & L. 171; *Ecclesall, In re*, 16 Beav. 297; *Lyford's Charity*, *ib.*; and, as to the statute generally, see reporter's note, 14 Beav. 120: however, it has been held that the Court has such a power, and that the title acquired thereby can be forced on an unwilling purchaser, *In re Ashton's Charity*, 22 Beav. 288. See now 16 & 17 Vict. c. 137, s. 24, 18 & 19 Vict. c. 124, s. 38, 23 & 24 Vict. c. 136, 25 & 26 Vict. c. 112, 32 & 33 Vict. c. 100; and see s. 12, which gives a power to the majority of the trustees of a charity to carry out a sale of the charity estate. Under the 1 Will. IV. c. 65, the Court has ordered the reversionary interest of a lunatic in realty to be sold for his maintenance: *In re Burbidge*, 3 Mac. & G. 1; see *In re Vavasour*, *ib.* 275; *In re Fisher*, 2 Ha. & Tw. 449; and this is now expressly authorized, see 16 & 17 Vict. c. 70, ss. 116, 124, 125, 139. Where the lunatic is tenant for life, and the income is more than sufficient for his maintenance, the Court has no power, under the 125th section, to sell the land for building purposes: *In re Corbett*, L. R. 1 Ch. Ap. 516. The Act does not interfere with the additional requirements of private Acts, *Re Bingley School*, 2 Dre. 283. As to the rights of real representative to surplus proceeds, see the Acts, and *In re Wharton*, 5 De G. M. & G. 33.

(*t*) *Blacklow* v. *Laws*, 2 Ha. 40; *Johnston* v. *Baber*, 8 Beav. 233; and see *Bristow* v. *Skirrow*, 27 Beav. 590.

(*u*) *Talbott* v. *Minnett*, 6 Ir. Eq. 83; *vide suprà*, p. 1196.

(*x*) *Colclough* v. *Sterum*, 3 Bli. 181, 186, 188; *Lutwych* v. *Winford*, 2 Bro. C. C. 248, 251; and see *Re Thompson's Settled Estates*, Johns. 418, 423; *Re Woodcock's Trusts*, L. R. 3 Ch. Ap. 230.

(*y*) *S. C.*; *Thomas* v. *Townsend*, 16 Jur. 736; *Dixon* v. *Wilkinson*, 21 L. T. 279; 22 L. J. 911; 1 Eq. R. 556.

(*z*) See Sug. 111; *Bowen* v. *Evans*, 1 J. & L. 178; 2 H. L. C. 257; *Edgeworth* v. *Edgeworth*, 12 Ir. Eq. 81. If participating in the fraud, of course he is liable; *Colclough* v. *Bolger*, 4

be apparent on the face of the decree (*a*): nor is a sale impeachable on the ground of its having been the object for which the suit, professedly directed to other purposes, was in fact instituted (*b*). And the decree is no protection against persons of whom the purchaser has actual notice that they ought to have been, but are not, parties to the suit (*c*); or against a judgment creditor, who does not come in under the decree (*d*); so that in every such case the purchaser should see that he obtains a discharge.

Chap. XXI. Sect. 5.

Cestuis que trust when unnecessary parties to conveyance.

Where the property is vested in trustees who have power to give a discharge for the purchase-money, and are bound by the decree, it is unnecessary that *cestuis que trust* who are not before the Court should be made parties to the conveyance (*e*).

Purchaser allowed compensation for mis-description of estate

A purchaser, after conveyance, has been allowed compensation out of his purchase-money, on the ground of the rent of the estate having been misstated in the particulars (*f*), or the length of an outstanding term (*g*). But of course this would not be allowed, if he purchased with notice of the error (*h*). When he claims compensation, he should apply by summons to have it either paid, or deducted from his purchase-money. Under special circumstances, he has been allowed to pay the purchase-money into Court and take possession without prejudice to his claim for compensation (*i*).

Dow. 54; *Lord Bandon* v. *Belcher*, 9 Bli. N. S. 532; see also on the general subject, *Thornhill* v. *Glover*, 3 Dru. & W. 195.

(*a*) *Gore* v. *Stacpoole*, 1 Dow. 30; 1 J. & L. 257.

(*b*) *Bowen* v. *Evan*, 1 J. & L. 178; 2 H. L. C. 257.

(*c*) *Colclough* v. *Sterum*, 3 Bli. 181—186; *Piers* v. *Piers*, 1 Dru. & Wal. 265; *Rolleston* v. *Morton*, 1 Dru. & W. 177; and see Sug. L. of Prop. 682; 9 Ha. App. 37; *Doody* v. *Higgins*, 9 Ha. App. 37; *Goldsmid* v. *Stonehewer*, *ib.* 38; as to representation, *Harman* v. *Riley*, *ib.* 40; *Densem* v. *Elworthy*, *ib.* 42; and see *ib.* 47, 48.

(*d*) *Knight* v. *Pocock*, 24 Beav. 436.

(*e*) *Walters* v. *Jones*, 6 Jur. N.S. 530.

(*f*) *Cann* v. *Cann*, 3 Sim. 447; where the conditions provided that compensation should be allowed for any error in the particulars.

(*g*) *Horner* v. *Williams*, 1 J. & C. 274. As to whether, in an ordinary case, the *quantum* of compensation can be determined under the provisions of the Common Law Procedure Act, see *Bos* v. *Helsham*, L. R. 2 Ex. 72, following *Collins* v. *Collins*, 26 Beav. 306; and compare *Re Hopper*, L. R. 2 Q. B. 367; and *vide suprà* pp. 222, 224.

(*h*) *Campbell* v. *Hay*, 2 Moll. 102.

(*i*) *Man* v. *Ricketts*, 5 De G. & S. 116.

Chap. XXI. Section 6.

(6.) *As to the practice, when the purchaser fails to complete.*

As to the practice, &c.

Course to be adopted if purchaser refuse to complete.

As we have already seen (*k*), under the present practice, no step need be taken by the highest bidder in order that he may assume the character of purchaser; the conditions of sale fix a time at which all parties may, if they think fit, attend by their solicitors at the judge's chambers to settle the certificate of sale; if a bidder fails to attend, the certificate is settled in his absence; and, when settled, is signed and filed, and becomes binding on him without notice. If he take no step to complete the purchase, and he be supposed to be incompetent in point of means, the vendors may apply, on notice, that he be discharged, and that the estate be re-sold (*l*); or, as is now the more usual course, to obtain an order, not that the purchaser be discharged, but that the estate be re-sold, and that he may pay the expenses arising from his non-completion of the purchase, the expenses of the application to the Court, and of the re-sale, and any deficiency in price on the re-sale (*m*): under such an order, however, the purchaser has still a *locus pœnitentiæ;* so that if the property, being a reversion, fall into possession before a re-sale, he may claim it on paying his purchase-money with costs (*n*). Where the purchaser makes default in payment of the purchase-money and takes no step to complete the sale, an order may, it is conceived, be obtained to rescind the contract altogether (*o*).

If supposed to be irresponsible.

Purchaser becoming bankrupt before completion.

Where, before the time fixed for completion, the purchaser became bankrupt, and his assignees declined to complete, the Court held that the deposit was forfeited, and made an order for re-sale; but refused to make it without prejudice to any right which the vendors might have against the bankrupt or his assignees, in the event of a less price being obtained (*p*).

(*k*) *Suprà*, p. 1200.

(*l*) *Hodder* v. *Ruffin*, 1 V. & B. 514; *Cuningham* v. *Williams*, 2 Anst. 344; Dan. Ch. Pr. 1193; Sug. 102.

(*m*) *Harding* v. *Harding*, 4 Myl. & C. 514; *Saunders* v. *Gray*, *ibid.* 515; *Grey* v. *Grey*, 1 Beav. 199.

(*n*) *Robertson* v. *Skelton*, 13 Beav. 91.

(*o*) Compare *Foligno* v. *Martin*, 16 Beav. 586; *Sweet* v. *Meredith*, 9 Jur. N. S. 569; 4 Giff. 207; *Watson* v. *Cox*, L. R. 15 Eq. 219; cases of specific performance.

(*p*) *Depree* v. *Bedborough*, 9 Jur.

Chap. XXI. Sect. 6.

If supposed to be responsible.

If the purchaser is responsible, the vendors may take out a summons requiring him to show cause why he should not be ordered within a given time to pay his money into Court, and to pay the costs of the summons (q); if he appear on the summons, he is *primâ facie* entitled to have a reference on the title; and, if he do not appear, it seems to be requisite, before any order can be made, that the vendors shall have delivered the abstract, and procured the chief clerk's certificate in favour of the title (r): or that the purchaser shall have accepted the title (s). Where defendants to the suit, who were entitled with the plaintiff to shares in the estate, purchased a part of it of which they were in possession, and the conditions precluded any objection to the title, they were ordered to pay in the *entire* purchase-money, although they claimed allowances for improvements, and the estate was incumbered (t).

Purchaser, whether allowed to forfeit deposit and abandon contract.

On the other hand, where the contract is inequitable (u), or where to enforce it would be attended with great hardship, as in the case of a sudden and violent change in the money market (x), or where the purchaser has by mistake given an unreasonable price for the estate (y), and is expeditious in applying to the Court (z), he will, according to some authorities, be allowed to forfeit his deposit (if any), and abandon the contract; but this will not be conceded on the mere ground of the price being excessive (a); nor in the case of a person without authority buying the estate to prevent a sale at an undervalue (b); nor, it is conceived, under any ordinary state of circumstances.

N. S. 1317; 4 Giff. 479. See *Moeser* v. *Wisker*, L. R. 6 C. P. 120.

(q) *Lansdown* v. *Elderton*, 14 Ves. 512.

(r) Dan. Ch. 1193, and cases cited; and see *Bulmer* v. *Allison*, 8 Jur. 440, V.-C. W.; 15 L. J., N. S. 11 Ch.

(s) *Rutter* v. *Marriott*, 10 Beav. 33.

(t) *Bulmer* v. *Allison*, 15 L. J., N. S., Ch. 11, L. C.; Seton, 1194.

(u) Sug. 119.

(x) *Savile* v. *Savile*, 1 P. Wms. 745; *sed quære*.

(y) *Morshead* v. *Frederick*, cited, but with disapprobation, Sug. 120; see *Coote* v. *Coote*, 2 Ir. Eq. 159.

(z) See *Price* v. *North*, 2 Y. & C. 620, 626.

(a) *In re Birch*, cited Sug. 119.

(b) *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Ex parte Tomkins*, Sug. 120.

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All the more important decisions upon the construction of the Acts and Rules down to the end of the Michaelmas Sittings, 1877, will, I believe, be found noticed with some of later date.

Many minor typographical changes have been made in this edition, which will, I hope, be found to increase its convenience in use. Italic type has been used throughout the book to indicate repealed matter.

All the Rules of Court, both those in the Schedule and those of later date, have been issued without marginal notes. I have ventured to add short marginal notes to them.

I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Roll's Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annexed to the rules, and in many other ways.

I wish particularly to notice the Table of Cases, which Mr. Biddle has prepared. The course ordinarily adopted throughout the book is to cite each case with a reference to only one report of it, except where there appeared special reason for referring to another. The Law Reports are commonly cited where the case has appeared in that series. To have mentioned in the body of the work every report of each case would have been a cumbrous and I think an inconvenient plan. On the other hand, many practitioners use series of reports other than those commonly cited in this Book. To meet the difficulty thus arising, the Table of Cases gives a reference to all the reports of each case cited.

The reconstruction of the Index, rendered necessary by the large amount of new matter, has been kindly undertaken by my learned friend, Mr. Harry Greenwood, of the Chancery Bar.

The Introduction which appeared in the former edition has been omitted in this. That Introduction was intended to assist the reader to become acquainted with a system then wholly new. The system is no longer new or unknown, so that there is not the same necessity for such an introduction. The omission contributes to secure an object which I have throughout had in view, the keeping down the bulk of the book.

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